

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 284.

SAMUEL STEWART, AS TREASURER OF WYANDOTTE
COUNTY, KANSAS, PLAINTIFF IN ERROR,

vs.

THE CITY OF KANSAS CITY, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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a In the Supreme Court of the State of Kansas.

No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Appellant.

Be it remembered, that on the 4th day of August, 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a certified copy of the notice of appeal and the journal entry of judgment, of the district Court of Wyandotte County, Kansas, which are in words and figures as follows, to-wit:

b 18979. Filed Aug. 4, 1913. D. A. Valentine, Clerk Supreme Court.

In the District Court of Wyandotte County, Kansas, Division Number 3.

No. 465-A.

THE CITY OF KANSAS CITY, KANSAS, Plaintiff,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Defendant.

Writ of Mandamus.

Now on this fifth day of July, A. D., 1913, comes on to be heard the above entitled cause, the plaintiff appearing by Richard J. Higgins, and the defendant appearing by L. W. Keplinger and C. W. Trickett, his attorneys, and the court having heard the evidence produced by the parties hereto and being fully advised in the premises;

It is by the court found, that the City of Kansas City, Kansas, is a municipal corporation, a city of the first class, having a population of more than one hundred thousand inhabitants.

That the defendant, Samuel Stewart, is and at all the times herein mentioned was the duly elected, qualified and acting county treasurer of Wyandotte County, Kansas.

That the defendant, Samuel Stewart, as County Treasurer of Wyandotte County, Kansas, now has and for a long time past has had large sums of money in his possession, which money is the property of the City of Kansas City, Kansas, it being the proceeds of moneys collected by him and more particularly the city's proportion of interest and penalties collected upon delinquent taxes during the years 1912 and 1913.

c That the defendant, Samuel Stewart, as county treasurer of Wyandotte County, Kansas, did heretofore on the — day of January, A. D. 1913, by order of the county commissioners of Wyandotte County, Kansas, unlawfully charge against the funds of the City of Kansas City, Kansas, then in his possession which had been collected by him as county treasurer of Wyandotte County, Kansas, and as the agent of the city of Kansas City, Kansas, the sum of \$30,840.24, and credited said sum to the funds of Wyandotte County, Kansas; that said charge was wholly and entirely unlawful and improper and that said sum of money is yet in the hands of the said Samuel Stewart as county treasurer of Wyandotte County, Kansas, although credited to the funds of Wyandotte County, Kansas, *although credited to the funds of Wyandotte County, Kansas.*

That an ordinary suit at law would be unavailing in the premises for the reason that the incidental delay would in all probability deny the right to recover during the fiscal year.

That the City of Kansas City, Kansas, constitutes eighty per cent of the taxable wealth of Wyandotte County, Kansas, and that a judgment obtained by the city of Kansas City, Kansas, against Wyandotte County, Kansas, would simply result in the city paying over to itself eighty per cent of the amount of the judgment so recovered.

It is therefore, by the Court ordered and directed that the said Samuel Stewart, as County Treasurer of Wyandotte County, Kansas be and he is hereby required forthwith and not later than the 16th day of July, A. D. 1913, at 9:30 o'clock A. M., of said day to pay to the City of Kansas City, Kansas, all sums of money due to the City of Kansas City, Kansas, including all interest and penalties upon delinquent taxes within the City of Kansas City, Kansas, collected during the years 1912 and 1913 and also to pay the sum of \$30,840.24 which has been heretofore charged against the funds of the City of Kansas City, Kansas.

d The Sheriff of Wyandotte County, shall forthwith serve this writ by delivering the original hereof to the defendant.

J. H. SMITH, *Judge.*

Attest:

R. J. McFARLAND,

[SEAL.] *Clerk District Court,*

By E. F. BLUM, *Deputy.*

R. L. HINCH, *Sheriff,*

By JOHN A. WOLFE,

Under Sheriff.

e In the District Court of Wyandotte County, Kansas, Division
Number 3.

No. 465-A.

THE CITY OF KANSAS CITY, KANSAS, Plaintiff,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Defendant.

Journal Entry.

And now on this 22nd day of July, 1913, this cause comes on to
be heard upon the motion of the defendant for a new trial upon
the grounds in said motion set forth, and the Court having heard
the statement of counsel, and being duly advised doth overrule
said motion, to which ruling of the court the defendant duly ex-
cepted.

f In the District Court of Wyandotte County, Kansas, Third
Division.

No. 465-A.

THE CITY OF KANSAS CITY, KANSAS, Plaintiff,

vs.

SAMUEL STEWART, County Treasurer, Defendant.

Notice of Appeal.

To the City of Kansas City, Kansas:

Please take notice that the undersigned defendant appeals from
the final judgment in the above entitled case, also from the order
overruling defendant's motion for new trial.

KEPLINGER & TRICKETT,

Attorneys for Defendant.

Service of above notice acknowledged this 22nd day of July, 1913.

RICHARD HIGGINS,

Attorney for Plaintiff.

Endorsed: No. 465-A. Filed July 22, 1913. R. J. McFarland,
Clk. Dist. Court, by C. L. Peterson, Deputy.

g *Certificate.*

STATE OF KANSAS,

Wyandotte County, ss:

I, R. J. McFarland, Clerk of the District Court of Wyandotte
County, Kansas, do hereby certify the foregoing to be a full, true

and correct transcript of the Final Judgment of the Court, the Order of the Court overruling defendant's Motion for a new Trial, and defendant's Notice of Appeal and the Proof of Service of same, in the foregoing entitled cause as the same now remain on file and of record in my office.

Witness my hand and the seal of said Court affixed at my office in the City of Kansas City, this 2nd day of August, 1913.

R. J. McFARLAND, *Clerk*,

[SEAL.]

By J. P. FOX, *Deputy*.

Endorsed: 18979. In the District Court of Wyandotte County, Kansas. No. 465-A, Div. 3. City of Kansas City, Kansas, Plaintiff, vs. Samuel Stewart, as Co. Treas. Wh. Co., Defendant. Deposit \$—. Notice of Appeal and Transcript. Filed Aug. 4, 1913. D. A. Valentine, Clerk Supreme Court.

h And also on the 7th day of October 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an abstract of the record in the above entitled cause, and is in the words and figures as follows, to-wit:

18979. Filed Oct. 7, 1913. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,
vs.
SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Appellant.

Appellant's Abstract of Evidence.

L. W. Keplinger, C. W. Trickett, Attorneys for Appellant.

1 In the Supreme Court of the State of Kansas.

No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,
vs.
SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Appellant.

Appellant's Abstract of Evidence.

Transcript of Evidence in Case.

In the District Court of Wyandotte County, Kansas, Third Division,
June Term, A. D. 1913.

No. 465-A.

THE CITY OF KANSAS CITY KANSAS, Plaintiff,
vs.
SAMUEL STEWART et al., Defendant.

Be it remembered, that on the trial of the above entitled cause,
which came on for hearing before the Court, the Hon. H. J.
2 Smith, Judge, presiding, the plaintiff appeared by Richard
J. Higgins, City Counsellor, and the defendant- appeared by
Messrs. Keplinger & Trickett, their attorneys, and the following
proceedings were had, to-wit, on the 5th day of July, A. D. 1913,
at the regular June term of said Court:

The plaintiff, to sustain the issues upon its part, offered and introduced evidence as follows, to-wit:

By Mr. Higgins: I offer in evidence as part of the evidence of the City of Kansas City, Kansas, the affidavit for the Alternative Writ of Mandamus in Case No. 465-A.

Mr. Trickett: To which the defendant- objects as incompetent, irrelevant and immaterial in this case.

Objection overruled by the Court. Defendants except.

Said affidavit was thereupon read to the Court, and received in evidence and is as follows, to-wit:

Affidavit for Alternative Writ of Mandamus.

In the District Court of Wyandotte County, Kansas.

THE CITY OF KANSAS CITY, Kansas, Plaintiff,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County, Kansas, Defendant.

STATE OF KANSAS,

County of Wyandotte, ss:

Charles W. Green as Mayor of the City of Kansas City, Kansas, for and in behalf of the City, first being duly sworn, says:

That the City of Kansas City, Kansas, is a municipal corporation and a city of the first class, having a population of more than 100,000 inhabitants.

Second. The defendant, Samuel Stewart, is, and at all times herein mentioned was the duly elected, qualified and acting Treasurer of Wyandotte County, Kansas.

Third. The defendant, Samuel Stewart, as County Treasurer of Wyandotte County, Kansas, now has and for more than six months last past has had large sums of money in his possession, which money is the property of the City of Kansas City, Kansas, it being the proceeds of taxes collected by him and more particularly the City's proportion of the interest and penalties collected upon taxes for the years 1910, 1911, 1912 and 1913.

Fourth. That the said Samuel Stewart heretofore and on the — day of January, A. D. 1913, by order of the Board of County Commissioners of Wyandotte County, Kansas, unlawfully charged against the funds of the City of Kansas City, Kansas, then in his possession and which had been collected by him as the County Treasurer of Wyandotte County, Kansas, and as the agent of the City of Kansas City, Kansas, the sum of \$30,840.24, and credited said sum to the funds of Wyandotte County, Kansas; that said charge was wholly and entirely unlawful and improper; that the said sum of money is yet in the hands of the said Samuel Stewart as the Treasurer of Wyandotte County, Kansas, although credited to the funds of Wyandotte County, Kansas.

Fifth. That the City of Kansas City, Kansas, is operating under the commission form of government; that it is necessary under the law for the City to carefully prepare a budget of all receipts and expenditures in the month of August of each year for the next ensuing year; that in the month of August, 1912, the City prepared a careful budget for all receipts and expenditures for the year 1913; that a careful estimate was made of all receipts

from taxation and other sources that had been received by the City during the year 1913; that if the said sum so unlawfully charged by the said Samuel Stewart to the City is allowed to be retained by Wyandotte County, Kansas, that all the activities of the City will be seriously crippled; that the business of the city will be impaired, and it will be impossible for the City to operate its affairs in the manner necessary; that an ordinary suit at law would be unavailing for the reason that the incidental delay would deny to your relator his needs and demands. The City of Kansas City, Kansas, constitutes eighty per cent of the taxable wealth of Wyandotte County, Kansas; that a judgment obtained by the City of Kansas City, Kansas, against Wyandotte County, Kansas, could not be recovered during the present fiscal year of the City of Kansas City, Kansas, and if recovered it would simply result in the City paying to itself eighty per cent of the amount of the judgment.

Wherefore, your relator prays for the issuance of an alternative writ of mandamus directed to the said Samuel Stewart as County Treasurer of Wyandotte County, Kansas, requiring him on or before the day therein specified to pay to the City of Kansas City, Kansas, all sums of money due to the City of Kansas City, Kansas, its proportion of all interest and penalties collected during
 5 the years 1910, 1911, 1912 and 1913 and also to pay to the City of Kansas City, Kansas, the said sum of \$30,840.24, which has been heretofore charged to the funds of Kansas City, Kansas, and credited to the funds of Wyandotte County, Kansas, or that he show cause on said day why such payment is not made and that he have with him then and there this writ.

C. W. GREEN.

Subscribed and sworn to before me this 26th day of April, A. D. 1913.

N. D. NUTTER,
Notary Public.

[SEAL.]

My commission expires November 12, 1916.

Mr. Higgins: I also offer in evidence the alternative writ of mandamus issued by this Court.

Mr. Trickett: To which the defendants object as incompetent, irrelevant, immaterial and not proper evidence in this case.

Objection overruled by the Court. Defendants except.

Said alternative writ was thereupon received and read to the Court and is as follows, to-wit (caption omitted):

"Alternative Writ of Mandamus.

"Now, on this 26th day of April, A. D. 1913, the City of Kansas City, Kansas, appearing by Richard J. Higgins, City Attorney, and there being presented to the Court the affidavit for an alternative writ of mandamus in the above entitled cause, and the motion
 6 for such alternative writ of mandamus, and the Court having examined the affidavit and motion and being fully advised

in the premises, and it appearing to the Court from examination of said affidavit and motion, that:

The City of Kansas City, Kansas, is a municipal corporation and a city of the first class, having a population of more than 100,000 inhabitants.

Second. The defendant, Samuel Stewart, is, and at all times herein mentioned, was the duly elected, qualified and acting Treasurer of Wyandotte County, Kansas.

Third. The defendant, Samuel Stewart, as County Treasurer of Wyandotte County, Kansas, now has and for more than six months last past has had large sums of money in his possession, which money is the property of the City of Kansas City, Kansas, it being the proceeds of taxes collected by him, and more particularly the City's proportion of the interest and penalties collected upon taxes for the years 1910, 1911, 1912 and 1913.

Fourth. That the said Samuel Stewart heretofore and on the — day of January, A. D. 1913, by order of the Board of County Commissioners of Wyandotte County, Kansas, unlawfully charged against the funds of the City of Kansas City, Kansas, then in his possession and which had been collected by him as the County Treasurer of Wyandotte County, Kansas, and as the agent of the City of Kansas City, Kansas, the sum of \$30,840.24, and credited the said sum to the funds of Wyandotte County, Kansas; that said

charge is wholly and entirely unlawful and improper; that the said sum of money is yet in the hands of the said Samuel Stewart as the Treasurer of Wyandotte County, Kansas, although credited to the funds of Wyandotte County, Kansas.

Fifth. That the City of Kansas City, Kansas, is operating under the Commission form of Government; that it is necessary under the law for the City — carefully prepare a budget of all receipts and expenditures in the month of August of each year for the next ensuing year; that in the month of August, 1912, the City prepared a careful budget for all receipts and expenditures for the year 1912, that a careful estimate was made of all receipts from taxation and other sources that had been received by the City during the year 1913; that if the said sum so unlawfully charged by the said Samuel Stewart to the City is allowed to be retained by Wyandotte County, Kansas, that all the activities of the City will be impaired, and it will be impossible for the City to operate its affairs in the manner necessary; that an ordinary suit at law would be unavailing for the reason that the incidental delay would deny to your relator its needs and demands. The City of Kansas City, Kansas, constitutes eighty per cent of the taxable wealth of Wyandotte County, Kansas; that a judgment obtained by the City of Kansas City, Kansas, against the Wyandotte County, Kansas, could not be recovered during the present fiscal year of the City of Kansas City, Kansas, and if recovered it would simply result in the city paying to itself eighty per cent of the amount of the judgment.

It is therefore by the Court ordered and directed that the said Samuel Stewart as County Treasurer of Wyandotte County, Kansas, be and he is hereby required on or before the 3rd day of May, 1913, to pay to the City of Kansas City, Kansas, all

sums of money due to the said City of Kansas City, Kansas, its proportion of all interest and penalties collected during the years 1910, 1911, 1912 and 1913, and also pay to the City of Kansas City, Kansas, the sum of \$30,840.24, which has been heretofore charged against the funds of the City of Kansas City, Kansas, and credited to the funds of Wyandotte County, Kansas, or that he show cause why such payment is not made, and that he have with him this writ and that he make return thereon the 3rd day of May, A. D. 1913, at 9:30 o'clock a. m.

H. J. SMITH, *Judge.*

Attest:

R. J. McFARLAND, *Clerk.*

By J. P. FOX, *Deputy.*

[SEAL.]

By Mr. Higgins: There are two points upon which the City is seeking to recover; one is to recover in this case on account of the City's portion of interest and penalties collected during the years 1910, 1911, 1912 and 1913, and also this specific sum of \$30,840.24, which was charged by the County against the City's funds by virtue of this order of the County Commissioners. (Producing paper.) Is there any contention that this order was not made directing this charge should be made?

Mr. Trickett: We admit that is the order that was made by the Board of County Commissioners.

Mr. Higgins: Is there an admission that the County Treasurer did make the charge as directed by the Board of County Commissioners?

Mr. Trickett: The charge was made by the County Clerk.

Mr. Higgins: For the purpose only of showing that the County Board did make an order on the 7th day of January, 1913, directing the County Treasurer to make that charge against the City's funds, of the sum set out in the Alternative Writ of Mandamus, to-wit, the sum of \$30,840.24, the City offers a copy of the order made by the County Board.

Mr. Trickett: It is understood that the order goes in as a whole.

The Court: It is all in.

Said order was thereupon marked Exhibit No. 1, for identification.

Said order was thereupon received and read in evidence and is as follows, to-wit:

EXHIBIT No. 1.

Whereas for the years 1909, 1910 and 1911 the rebates allowed to owners of real estate and personal property when full payment was made in December was by the County Treasurer charged to the general fund of Wyandotte County, Kansas, on all property within the corporate limits of the City of Kansas City, Kansas; and

Whereas, the County Treasurer paid to the Treasurer of the City of Kansas City, Kansas, the full amount of their taxes without de-

ducting therefrom the amount of rebates so allowed, thereby causing the county and taxpayers outside of the corporate limits of Kansas City, Kansas, to pay a part of the taxes of the said City of Kansas City, Kansas, and

Whereas, the City of Kansas City, Kansas, is claiming the penalties charged upon property in said years 1909, 1910, and 1911; and

Whereas, the rebates during said years exceed the penalties by the sum of \$30,840.24 on city taxes; and

Whereas, the Board of County Commissioners has caused to be ascertained the over-payment in each of the various funds of the City of Kansas City, Kansas, that is the excess of rebates over penalties for each of the years named.

Now therefore, be it resolved that the County Clerk and the County Treasurer be and are hereby directed to charge such over-payment against the various funds as follows, to-wit:

General Fund of Kansas City, Kansas—

For 1909	\$614.92
1910	1,257.64
1911	1,388.46
Total	<u>\$3,261.02</u>

General Improvement Fund of Kansas City, Kansas—

For 1909	\$942.86
1910	1,006.13
1911	1,110.76
Total	<u>\$3,059.75</u>

11 Water Fund of Kansas City, Kansas—

For 1909	\$186.96
1910	503.07
1911	555.38
Total	<u>\$1,245.41</u>

Light Fund of Kansas City, Kansas—

For 1909	\$409.94
1910	503.07
1911	555.38
Total	<u>\$1,468.39</u>

Fire Fund of Kansas City, Kansas—

For 1909	\$819.88
1910	1,006.13
1911	1,555.08
Total	<u>\$3,381.09</u>

Judgment Fund of Kansas City, Kansas—

For 1909	\$122.98
1910	251.53
1911	277.69
Total	\$652.20

Internal Improvement Bond Sinking Fund of Kansas City, Kansas—

For 1909	\$1,967.71
1910	2,012.26
1911	2,221.54
Total	\$6,201.51

12 Bond Interest Fund of Kansas City, Kansas—

For 1909	\$982.85
1910	1,006.13
1911	1,388.46
Total	\$3,378.44

Park Fund of Kansas City, Kansas—

For 1909	\$409.94
1910	503.07
1911	278.19
Total	\$1,191.20

Park District Fund of Kansas City, Kansas—

For 1911	\$278.18
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Park Bond Interest Fund of Kansas City, Kansas—

For 1909	\$131.19
1910	251.53
1911	555.38
Total	\$938.10

Special Fund of Kansas, Kansas—

For 1909	\$1,760.16
1910	1,725.69
1911	2,299.10
Total	\$5,784.95

and that the said County Clerk and County Treasurer be and are further instructed to credit the county general fund with said sums.

Be it further resolved that the County Clerk be and is hereby instructed to ascertain the excess of rebates over penalties on the levies of Kansas City, Kansas, for the years 1895 to 1908, inclusive, and report the same to this Board; and

Be it further resolved that the County Treasurer be and is hereby instructed to pay to the City of Kansas City, Kansas, only the amount of taxes collected for the year 1912, that is that said City of Kansas City, Kansas, be not given or paid any sum for the rebates allowed for full payment in December, and is further directed to make no charge against the general fund of Wyandotte County on account of rebates allowed on the city levy of taxes and that if the County Treasurer by reason of his method of bookkeeping is unable to ascertain such proportion that he withhold a sum sufficient until the correct amount can be ascertained.

Mr. Higgins: I now offer in evidence the affidavit of Samuel Stewart, for the purpose, only, of showing that he complied with the order of the Board of County Commissioners, to charge the amounts specified in Exhibit No. 1, against the funds of the City of Kansas City, Kansas, and credit the same to the funds of Wyandotte County.

Mr. Trickett: We are willing to waive the claims of the sufficiency of the affidavit, and admit that the County Treasurer has done the things stated in the affidavit.

Mr. Higgins: I offer it only for the purpose of showing the order was made and complied with.

Said affidavit was thereupon marked Exhibit No. 2, for identification, was received and read in evidence and is as follows, to-wit:

14 *Affidavit of Samuel Stewart.*

In the Court of Common Pleas of Wyandotte County, Kansas.

THE CITY OF KANSAS CITY, KANSAS, Plaintiff,

v.

THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY,
KANSAS, et al., Defendants.

STATE OF KANSAS,

Wyandotte County, ss:

Samuel Stewart, being first duly sworn, on oath deposes and says that he is the duly elected, qualified and acting County Treasurer of Wyandotte County, Kansas, and has in his charge and keeping the books and records of the Treasurer's office of said Wyandotte County, Kansas.

And affiant says that in the collection of taxes the law provides for a rebate upon the second half when the full sum is paid in December; that during the years 1909, 1910 and 1911, the rebates allowed on city property under the city levy exceeded the interest and penalties upon city property under the city levy by the sum of \$30,840.24; that said rebates were chargeable to the various funds of Kansas City, Kansas, but that by mistake and misinterpretation of the law, the said Kansas City, Kansas, in its various funds as

hereinafter shown, was paid the sum of \$30,840.24 in excess of the taxes collected upon city property under the city levy; in other words, that the City of Kansas City, Kansas, was paid for the taxes for the years 1909, 1910 and 1911 the sum of \$30,840.24 in excess of the amount of taxes collected on city property under the city levy, and that by mistake said sum was charged to the county general fund; that thereafter and on or about the — day of January, 1913, the Board of County Commissioners of Wyandotte County, Kansas, repudiated said charge and caused to be ascertained the amount of excess so paid in each of the various city funds and made an order upon this affiant demanding that he correct said mistake upon his books.

And affiant further says that the County Clerk of Wyandotte County, Kansas, upon the making of said order by said Board of County Commissioners, corrected said mistakes upon his books by charging this defendant said sum; that thereupon and before the institution of this proceeding this affiant corrected said charges and had charged back to the various funds of the plaintiff city, as shown by Exhibit "A" hereto attached, the same being the sums overpaid to the City in said funds.

And affiant further says that the collection of delinquent taxes for the years 1909, 1910 and 1911 was sufficient to offset these amounts and therefore did not deplete or reduce the income of the City from its levy for the current year.

Affiant further says that for more than a year last past the said Board of County Commissioners have been protesting against the charging of said sum or any part thereof to the County's general fund and passed an order claiming a return of the same and that the County Clerk of Wyandotte County, Kansas, upon the books of his office made the proper entries for the return of said sum to said County and that said return of money was made prior to the institution of this suit and that the same has been returned and paid to the county under and by virtue of said order and under and by virtue of the laws of the State of Kansas, and affiant has not said sum in his possession or under his control so as to return the same and could not pay the same to plaintiff except upon a judgment rendered in a proper case, upon a warrant drawn therefor by the said Board of County Commissioners.

And affiant further says that the payment to said City of Kansas City, Kansas, of any part of said rebates would be compelling residents of Wyandotte County outside of Kansas City, Kansas, to pay a part of the City taxes of Kansas City, Kansas, which in the judgment of affiant would be unconstitutional and void.

And affiant further says that he has paid and distributed to the City of Kansas City, Kansas, at regular and stated intervals all sums of money collected upon the levy made by the said City of Kansas City, Kansas, and that he has in his possession no money belonging to said Kansas City, Kansas, other than such as has been collected since the last distribution and that the same will be distributed and paid when the regular time occurs therefor and as soon as the same can be checked up and ascertained.

And affiant further saith not.

SAMUEL STEWART.

Subscribed and sworn to before me this 28th day of January, 1913.

FRANK M. HOLCOMB,
County Clerk.

EXHIBIT "A."

Filed Jan. 7, 1913.

Whereas, for the years 1909, 1910 and 1911, the rebates allowed to owners of real estate and personal property when full payment was made in December, was by the County Treasurer charged to the general fund of Wyandotte County, Kansas, on all property within the corporate limits of the City of Kansas City, Kansas, and

Whereas, the County Treasurer paid to the Treasurer of the City of Kansas City, Kansas, the full amount of their taxes without deducting therefrom the amount of rebates so allowed thereby causing the County and taxpayers outside of the corporate limits of Kansas City, Kansas, to pay a part of the taxes of the said City of Kansas City, Kansas, and

Whereas, the City of Kansas City, Kansas, is claiming the penalties charged upon property in said years 1909, 1910 and 1911, and

Whereas, the rebates during said years exceed the penalties by the sum of \$30,840.24 on City taxes, and

Whereas, the Board of County Commissioners has caused to be ascertained the overpayment in each of the various funds of the City of Kansas City, Kansas, that is the excess of rebates over penalties for each of the years named.

Now therefore, be it resolved that the County Clerk and the County Treasurer be and are hereby directed to charge such overpayment against the various funds as follows, to-wit:

General Fund of Kansas City, Kansas—

For 1909	\$614.92
1910	1,257.64
1911	1,388.46
Total	\$3,261.02

18 General Improvement Fund of Kansas City, Kansas—

For 1909	\$942.86
1910	1,006.13
1911	1,110.76
Total	\$3,059.75

Water Fund of Kansas City, Kansas—

For 1909	\$186.96
1910	503.07
1911	555.38
Total	\$1,245.41

Light Fund of Kansas City, Kansas—

For 1909	\$409.94
1910	503.07
1911	555.38
Total	<u>\$1,468.39</u>

Fire Fund of Kansas City, Kansas—

For 1909	\$819.88
1910	1,006.13
1911	1,555.08
Total	<u>\$3,381.09</u>

Judgment Fund of Kansas City, Kansas—

For 1909	\$122.98
1910	251.53
1911	277.69
Total	<u>\$652.20</u>

19 Internal Improvement Bond Sinking Fund of Kansas City, Kansas—

For 1909	\$1,967.71
1910	2,012.26
1911	2,221.54
Total	<u>\$6,201.51</u>

Bond Interest Fund of Kansas City, Kansas—

For 1909	\$982.85
1910	1,006.13
1911	1,388.46
Total	<u>\$3,378.44</u>

Park Fund of Kansas City, Kansas—

For 1909	\$409.94
1910	503.07
1911	278.19
Total	<u>\$1,191.20</u>

Park District Fund of Kansas City, Kansas—

For 1911	\$278.18
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Park Bond Interest Fund of Kansas City, Kansas—

For 1909	\$131.19
1910	251.53
1911	555.38

Total..... \$938.10

Special Improvement Fund of Kansas City, Kansas—

For 1909	\$1,760.16
1910	1,725.69
1911	2,299.10

Total..... \$5,784.95

20 and that the said County Clerk and County Treasurer be and are further instructed to credit the county general fund with said sums.

Be it further resolved that the County Clerk be and is hereby instructed to ascertain the excess of rebates over penalties on the levies of Kansas City, Kansas, for the years 1895 to 1908, inclusive, and report the same to this Board, and

Be it further resolved that the County Treasurer be and is hereby instructed to pay to the City of Kansas City, Kansas, only the amount of taxes collected for the year 1912; that is, that said City of Kansas City, Kansas, be not given or paid any sum for the rebates allowed for full payment in December, and is further directed to make no charge against the general fund of Wyandotte County on account of rebates allowed on the City levy of taxes and if the County Treasurer by reason of his method of bookkeeping is unable to ascertain such proportion that he withhold a sum sufficient until the correct amount can be ascertained.

Be it further resolved that the County Treasurer be instructed to pay over to the City Treasurer no interest and penalty collected on back taxes for the years from 1895 to 1908 inclusive until the over-payment for said years can be ascertained and adjusted.

JAMES E. CATON, called, sworn and examined as a witness on behalf of the Plaintiff, City of Kansas City, Kansas, testified as follows:

Direct examination by Mr. Higgins:

Q. What is your business?

A. Finance Commissioner of Kansas City, Kansas.

21 Q. How long have you held that position?

A. A little more than two years—two years last April.

Q. You formerly held the position of County Clerk of Miami County?

A. Yes.

Q. What was your business and occupation prior to your being Finance Commissioner of Kansas City, Kansas?

A. Municipal Auditor.

Q. You were County Clerk of Miami County something like twenty years ago?

A. Just about that time.

Q. Since that time your work has largely been connected with auditing and examination of County and City accounts in the State of Kansas?

A. Yes.

Q. Have you devised a system of accounting in the State of Kansas under the laws of the State of Kansas?

A. Yes. My system has been installed in the offices by the State Tax Commissioners for all counties in Kansas—in the offices of the County Clerk and County Treasurer.

Q. And it is used generally throughout the State of Kansas?

A. Yes.

Q. Are you, as Finance Commissioner, in charge of and do you concern yourself with the receipt and collection of taxes by the City from the County?

A. Yes.

Q. The City Treasurer is an officer who is directly concerned with the receipt of that money from the County Treasurer is by law placed under the jurisdiction of the Commissioner of Finance and Revenue?

22 A. Yes, it has been assigned to our department.

Q. Do you know what the fact is with reference to the payment to the City by the County of interest and penalties upon delinquent taxes during the course of the past two or three or four years?

By Mr. Trickett: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendants except.

A. Yes, so far as my memory goes.

Q. Please state the facts.

Objection overruled. Defendants except.

A. During the period of time, I think, fully covered by the present County Treasurer.

By Mr. Trickett: We wish to object further on the ground it is not the best evidence; there is record evidence so this will not be competent.

By the Court: The receipts themselves will be the best evidence.

By Mr. Higgins: If this man knows what payments were made.

The Witness: I can't testify as to the exact amount; I can testify as to the notations on the receipts with reference to the interest and penalties.

Q. What are these notations?

By Mr. Trickett: Objected to as incompetent, irrelevant and immaterial for the reason that some receipts might be a partial distribution and not contain it and then the subsequent receipt might contain all of it for the—

23 By the Court: I will let him answer.

Exception.

A. They are entered on the County Treasurer's receipts.

Mr. Trickett: We add this to our objection, that the notations upon the receipts themselves will be the best evidence, that is secondary and we add to it for that reason——

By the Court: The receipts will be the best evidence.

Q. Can you produce those receipts?

A. Yes, sir.

Q. I wish you would please have them sent up.

(Witness produces papers.)

Q. Have you the receipts that were in the office of the City Treasurer during the year 1913, that is the first of January, 1913?

A. Yes, sir.

Q. Now I will hand you receipt marked No. 244 for \$4,903.16; I call your attention there to the notation there, "Except interest and penalties." Is that a collection of delinquent taxes?

Objected to by defendants as incompetent, irrelevant and immaterial and not the best evidence this witness having no means of knowing what the collections were for excepting as the instrument itself shows.

Objection overruled. Defendants except.

24 A. This receipt does not state on its face the years for which the collections were made.

Q. Have you in your possession a receipt for the year 1913 upon which there is a notation "Except interest and penalties"?

A. Yes.

Q. Will you please produce it?

A. (Produces paper) Receipt No. 261, under date of April 13, 1913, for delinquent collections for 1899 to 1911 "Except interest and penalties" noted on the face of the receipt. Also receipt No. 262, "Collections Kansas City, Kansas, for years 1904 to 1911 except interest and penalties," bearing date of April 14, 1913.

Q. Has the City received upon delinquent taxes during the year 1913, any interest and penalties?

Mr. Trickett: Objected to as not the best evidence, the witness not being in a position to know.

Mr. Higgins: We will show how he knows.

The Court: He may answer if he does know. Exception.

A. I only know from the County Treasurer's statement.

Q. And from these receipts?

A. From what the face of the receipts show.

Q. What is the fact from the knowledge you have received in this way?

Mr. Trickett: We renew our objection as not being the best evidence and being incompetent, irrelevant and immaterial.

25 Objection overruled. Defendants except.

A. That the interest and penalties have not been received.

Q. Did you talk with the County Treasurer personally about the matter?

A. Yes, I refused to accept the receipts unless he would specify whether or not they included interest and penalties under the delinquent collections.

Mr. Higgins: We offer these two receipts which the witness has identified in evidence in this case.

Mr. Trickett: To which the defendants object as incompetent, irrelevant and immaterial and for the further reason in picking out two receipts it is not shown that interest and penalties not included in these receipts, were included in other receipts.

Objection overruled. Defendants except.

Said receipts so offered in evidence being respectfully as follows, to-wit:

Treasurer's Office, Wyandotte County,
Kansas.

General	3,286.98
General Im-	
provement ..	2,758.96
Fire	3,314.60
Bond Interest.	3,194.83
Bond Sinking.	3,746.54
Sidewalk	2,683.75
Paving, etc...	22,234.10
Water	1,305.06
Light	1,348.55
Judgment	644.63
Imp. Bd. Skg.	1,706.62

\$46,224.62.

KANSAS CITY, KANSAS, Apr. 14-'13.

Received of Samuel Stewart, Treas-
urer of Wyandotte County, Kan.,
Forty-six thousand two hundred twenty-
four 62/000 Dollars, on account of
Taxes collected for years 1889 to 1911,
except Interest and Penalty as per
margin.

Orders total. 46,224.62

Treasurer of Kansas City, Kansas.

No. 261.

26

Treasurer's Office, Wyandotte County,
Kansas.

\$3,208.57.

KANSAS CITY, KANSAS, Apr. 14-'13.

Park General...	837.00
Park Dist.....	468.17
Pk. Bond Int...	154.77
Park Bond	
Sinking	936.30
Pk. Sidewalk...	437.22
Park Paving...	375.11
Total.....	3,208.57

Received of Samuel Stewart, Treas-
urer of Wyandotte County, Kansas,
Thirty-two hundred eight and 57-100
Dollars, on account of Taxes collected
for Kansas City, Kans., for years 1904
to 1911, except Interest and Penalty as
per margin.

Treasurer of Kansas City, Kansas.

No. 262.

Q. Was there any money turned over during the year 1913 by the County Treasurer to the City accompanied by a receipt which purports to show that it included interest and penalties upon any delinquent taxes at any time?

A. No, sir.

Q. Did the County Treasurer tell you why he was holding this money?

Mr. Trickett: Objected to as incompetent, irrelevant and immaterial and being hearsay.

Objection overruled. Defendants except.

A. That he was so ordered.

Q. What reason did he give for withholding the penalties?

Same objection by defendants.

Objection overruled. Defendants except.

A. He said the Board of County Commissioners had ordered him not to turn over the interest and penalties.

Q. Did he say to what then he was giving credit on account of the interest and penalties collected upon said property?

A. He didn't.

27 Q. Did he say whether he was holding it for the County?

A. He didn't say.

Q. Now during the year 1912 have you the County Treasurer's receipts for each time?

A. Yes, sir.

Q. Have you any receipts there upon delinquent taxes?

A. Yes, I have.

Q. I wish you would please produce them?

A. I have them in my hand.

Mr. Higgins: The receipts which I now produce are numbered 92 to 100 inclusive, also receipt No. 126, 127, 180, 181, 193, 194, 195, 53, 56, 103, 128, 145. Are those the only receipts received during the year 1912 purporting to be delinquent taxes paid to the City during that period?

A. Yes, from January 1st, 1912, to January 1st, 1913.

Q. Except the one receipt?

A. Except the one receipt under date of October 25th, amounting to \$43,390.54, turned back to the County Treasurer for distribution among the years for which collection was made.

Q. Now I call your attention to the face of certain of these receipts which receipts to delinquent taxes, and I will ask you to point out the receipts that contain the notation "Interest and penalties not included" in the handwriting of Mr. Albright—just give the particulars of the receipts?

A. Receipt No. 126, 127, 180, receipt No. 181, receipt No. 193, receipt No. 194, 195, 261, 262, on all of them the notation, in my judgment, is in the handwriting of Mr. Albright.

28 Q. Now wherever the notation appears upon those receipts, on any other receipts other than those you have mentioned—"Interest and penalties not included"—that notation is in the handwriting of some other person other than Mr. Albright, is that correct?

A. Yes, in my judgment, it is.

Q. Do you know who did make the notation?

A. I do not, I presume some Clerk in the Treasurer's office.

Mr. Trickett: We move to strike out his presumption.

By the Court: The answer will be stricken out.

Q. Do you know whether that notation was on the receipt at the time it was handed to the City Treasurer?

A. I do not.

Q. Did the City receive during the year 1912 any monies purporting to be the collection of delinquent taxes covered by a receipt which purports to include interest and penalties upon such collections?

Objected to by defendants as incompetent, irrelevant and immaterial and the witness not having shown himself qualified to answer.

Objection overruled. Defendants except.

A. No, sir.

Q. Did you talk with any officer in the office of the County Treasurer during the year 1912 about payments due the City of interest and penalties?

A. Yes.

29 Q. Please state who the party was?

A. The County Treasurer, Mr. Samuel Stewart.

Q. Did you have a conversation with him in reference to the payment by the County Treasurer of interest and penalties upon delinquent taxes which were distributed during the year 1912?

A. I did, yes.

Q. What did he say?

Objected to by defendants as incompetent, irrelevant and immaterial.

Objection overruled.

Defendants except.

A. He said that he was instructed by the Board of County Commissioners to withhold interest and penalties—to not include interest and penalties.

Q. Did he say the City was not paid interest and penalties during that year?

A. This conversation, I think, took place on the 1st day—

By Mr. Trickett: Objected to as not responsive to any question.

By the Court: Overruled.

Defendants except.

A. (Continuing:) This conversation took place on the day the first delinquent collection was delivered by the County Treasurer, Mr. Stewart, to the then City Treasurer, Miss Daniels. Miss Daniels having referred the matter to me before she would receipt for the same to the County Treasurer.

Cross-examination by Mr. Trickett:

Q. There are a great many other receipts that you exhibited just before dinner?

A. Not for delinquent collections, no.

30 Q. There are a large number of receipts by the County Treasurer of money turned over to the City for various City funds, are there not?

A. Not a large number, no sir.

Q. Well, how many, about?

A. During one year?

Q. During the period?

A. I will give you the exact number if you will let me refer to my notes.

Q. Give us the number this year?

A. Forty-six in all from January 4, 1912, to December 31st, 1912, both days inclusive.

Redirect examination by Mr. Higgins:

Q. All other receipts—all receipts other than those which have been introduced in evidence are receipts which on their face purport to be receipts for current year collections—current for whatever year the receipts are?

Mr. Trickett: We object to that as improper and incompetent for the reason that it is calling for a conclusion of the witness as to what the receipts say on their face and not the best evidence.

By the Court: The witness may answer.

Exception.

A. The total amount collected from January 1st, 1912, to December 31st, 1912, is \$1,017,810.72, as shown by the receipts, which collections on account of the tax roll for 1912 and the remaining amount, \$120,881.00 represents delinquent collections during the year 1912 on the tax roll after the September sale of 1912 and prior years thereto.

31 Q. Are there receipts issued during the year 1912 and 1913, which on their face purport to be delinquent taxes?

A. During the year 1912, yes, for the year 1913 we will have to check the record.

Q. There has just been handed to me a receipt Numbered 179 for \$42,390.54 issued in 1912 that is the receipt that was missing this morning, I understand it?

A. Yes, that is the missing receipt.

Q. Now in whose handwriting is the notation—"Interest and penalties not included"—on that receipt?

A. In my judgment that was Mr. Albright's.

Mr. Higgins: We now offer in evidence this receipt marked No. 179.

Said receipt is attached hereto and is as follows, to-wit:

Treasurer's Office, Wyandotte, County,
Kansas.

General	2,609.99
General Imp..	2,241.73
Water	981.94
Bond Interest..	2,173.47
Imp. Bond Sink-	
ing.....	3,420.05
Sidewalk	2,529.12
aving	24,249.49
ight	1,050.79
udgment	475.24
re	1,833.83
ond Sinking..	824.89
Total.....	42,390.54

\$42,390.54.

KANSAS CITY, KANSAS,

Oct. 25, 1912.

Received of Samuel Stewart, Treasurer of Wyandotte County, Kansas, Forty-two thousand and three hundred ninety 54-100 Dollars on account of Taxes collected for Kansas City, years 1901 to 1911, interest not included, as per margin.

KATIE DANIELS,

Treasurer of Kansas City, Kansas.

No. 179.

Q. I wish you would check up your receipts for 1913 and see if we have introduced in evidence all receipts for the delinquent taxes?

A. I have for 1913.

Q. From the bunch of receipts we have just introduced all that contain any notation of delinquent taxes?

A. So far as I know, yes, but to be certain we would have to examine the records.

2 Witness excused.

Receipts above named are here offered and received in evidence over objection of defendant and are respectively, as follows, to-wit:

Treasurer's Office, Wyandotte, County,
Kansas.

General ...	8821	45.00
General		
Imp. ...	8874	43.50
oad	9890	1,821.33
ond In-		
terest ...	9892	463.58
ond Sink-		
ing	9893	130.50
edwalk ..	9894	169.11
aving ...	9895	125.00
eachers ..	9896	196.25
uilding ..	9897	99.75

\$3,094.02.

KANSAS CITY, KANSAS,

Feb'y 20, 1912.

Received of Samuel Stewart, Treasurer of Wyandotte County, Kansas, Three thousand ninety-four 02-100 Dollars, on account of Taxes collected for Kansas City, as per margin.

KATIE DANIELS,

Treasurer of Kansas City, Kansas.

Total.....	3,094.02
ash	3,094.02

No. 53.

General	130.68
General Improve- ment	125.24
Water	38.11
Bond Interest..	108.90
Bond Sinking..	174.24
Sidewalk	28.75
Paving	1,043.34
Light	43.56
Judgment.....	10.89
Weeds	1.58
Park Gen'l....	21.78
Ord. No. 6843..	2.80
Total.....	1,729.87

Treasurer's Office, Wyandotte, County,
Kansas.

\$1,729.87.

KANSAS CITY, KANSAS,
April 25, 1912.

Received of Samuel Stewart, Treas-
urer of Wyandotte County, Kansas,
Seventeen hundred twenty-nine and
87-100 Dollars, on account of Taxes
collected for Kansas City for year 1907,
Interest and penalty not included, as
per margin.

KATIE DANIELS,

Treasurer of Kansas City, Kansas.

No. 92.

Treasurer's Office, Wyandotte, County,
Kansas.

	1,041.79
	876.31
Water	391.02
	808.55
Bond Sinking Improvement.	1,631.80
	451.49
	740.07
Light	415.70
Judgment	183.79
Fire	654.73
Total.....	9,195.25
Orders Cash....	9,195.25

\$9,195.25.

KANSAS CITY, KANSAS,
June 15, 1912.

Received of Samuel Stewart, Treas-
urer of Wyandotte County, Kansas,
Ninety-one Hundred, ninety-five 25-
100 Dollars, on account of Taxes col-
lected for Kansas City for years 1901
to 1910 as per margin Interest and
Penalty not included.

KATIE DANIELS,

Treasurer of Kansas City, Kansas.

No. 126.

33 (The other receipts were same as above excepting as to
amount.)

The Plaintiff here rested its case.

And at the conclusion of the plaintiff's case, came the defendant,
Samuel Stewart, and presented a demurrer to the evidence of the
plaintiff upon the ground that the evidence produced by plaintiff is
insufficient to support a cause of action against defendant in this
action and insufficient to warrant the issuance of a writ of mandamus.

Demurrer overruled by the Court. Defendant excepts.

And thereupon, the defendant in support of the issues upon his
part offered and introduced evidence as follows, to-wit:

Mr. Trickett: We offer in evidence first the petition in case No.
10438.

said petition was thereupon received and read in evidence and follows, to-wit:

in the Court of Common Pleas in and for Wyandotte County,
Kansas.

THE CITY OF KANSAS CITY, KANSAS, Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY,
Kansas, and Samuel Stewart, County Treasurer of Wyandotte
County, Kansas, Defendants.

Petition.

The plaintiff for its cause of action against the above named defendants, says:

1. That it is a Municipal corporation and City of the first class acting under the Commission Form of Government and located within the County of Wyandotte and State of Kansas. That Samuel Stewart is, and for more than two years last past been, the duly elected, acting and qualified County Treasurer of Wyandotte County, Kansas.

That the said Samuel Stewart, as County Treasurer, now has for more than one year last past has had in his hands large sums of money, the total of which is to the plaintiff unknown, but which money is the City's proportion of interest and penalties upon delinquent taxes collected during the year- 1910, 1911 and 1912, which money the said Samuel Stewart, as County Treasurer, refuses to turn over to the City of Kansas City, Kansas, for the reason that he claims said money belongs to and is the property of Wyandotte County, Kansas, and not the property of the City of Kansas City, Kansas; in fact, said money is by law the property of the City of Kansas City, Kansas.

That the Board of County Commissioners of Wyandotte County, Kansas, heretofore and on the — day of January, A. D. 1913, directed the County Treasurer of Wyandotte County, Kansas, to release against the funds of the City of Kansas City, Kansas, then in the possession of the said Samuel Stewart, the sum of \$30,840.24, to credit the funds of Wyandotte County, Kansas with said amount.

That the said order was made, so your relator is informed and believes, upon the theory that the County of Wyandotte has paid to taxpayers the amount charged in rebates in excess of all interest and penalties collected during the years 1910, 1911 and 1912. Said charge is, however, an illegal charge for the reason that all rebates paid to taxpayers are a charge against the general fund of the County and not a charge against any fund of the City.

The City of Kansas City, Kansas, further states that, under the Commission Form of Government, it is required to and has made a budget of all receipts and expenditures for the year 1913. That the Board of County Commissioners of Wyandotte County, Kansas,

never claimed any right to the moneys above mentioned at or before the time that the annual budget was prepared. That said budget is so prepared as to permit the City to operate upon a strictly cash basis and without creating any large reserve.

That if the Board of Commissioners of Wyandotte County, Kansas, are permitted to appropriate the said sums of moneys above set out, that it will be fruitless for the City to attempt to collect by an ordinary suit at law the above sums of moneys or any part thereof.

That the City of Kansas City, Kansas, contains substantially eighty-five per cent of the taxable wealth of Wyandotte County, Kansas; that any judgment that might be obtained in favor of Kansas City, Kansas, and against the County of Wyandotte would simply result in the payment by the City to itself of eighty-five per cent of the amount of said judgment.

The activities of the City will in every way be seriously
36 crippled and affected if said charge is made.

Wherefore, your petitioner pray- for an alternative writ of mandamus directed to Samuel Stewart, as County Treasurer of Wyandotte County, Kansas, requiring him to pay on or before the date therein specified, to the City of Kansas City, Kansas, the City's proportion of all interest and penalties collected by him during the years 1910, 1911 and 1912.

And that he be likewise required to pay to the City of Kansas City, Kansas, the sum of \$30,840.24, which is the amount heretofore charged against the funds of the City and credited to the general fund of the County of Wyandotte.

And your petitioner further prays that the said Samuel Stewart be restrained and enjoined from paying to the County of Wyandotte any part of either of said funds, or from paying any warrant issued by the County of Wyandotte out of said funds.

And that the Board of County Commissioners of Wyandotte County, Kansas, be restrained and enjoined from using said funds or any part thereof until the final termination of this cause.

THE CITY OF KANSAS CITY, KANSAS,

By RICHARD J. HIGGINS, *City Attorney.*

STATE OF KANSAS,

County of Wyandotte, ss:

G. B. Little, of lawful age, being first duly sworn, upon his oath deposes and says, that he is the City Clerk of the City of Kansas

City, Kansas; that he has read the above and foregoing peti-
37 tion and knows the contents thereof and the purpose for

which the same is to be used, and that the matters and things contained therein are true, except such matters as are alleged herein on information and belief, and as to such matters he verily believes the same to be true.

G. B. LITTLE.

Subscribed and sworn to before me this 11th day of January, 1913.

[SEAL.]

N. D. NUTTER,
Notary Public.

My commission expires November 12, 1916.

Mr. Trickett: We offer in evidence the Answer of the Board of County Commissioners of Wyandotte County, Kansas, in said suit No. 10438.

Said answer was thereupon received and read in evidence over the objection of plaintiff, and is as follows, to-wit:

the Court of Common Pleas, Now Third Division of the District Court, in and for Wyandotte County, Kansas.

THE CITY OF KANSAS CITY, KANSAS, Plaintiff,

v.

THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, Kansas, and Samuel Stewart, County Treasurer of Wyandotte County, Kansas, Defendants.

Answer.

Come now the defendants and for answer to the petition of the plaintiff filed herein, admit that the plaintiff is a municipal corporation and a city of the first class and admit that Samuel Stewart is County Treasurer of Wyandotte County, Kansas, and deny each and every other allegation in said petition contained.

II.

And these defendants further answering say that the defendants are not indebted to the plaintiff in said sum of \$30,840.24 nor in any other sum.

And these defendants further answering say that so far as these defendants are advised or informed the contention of plaintiff is based upon the following facts:

That during the years 1909, 1910 and 1911 the rebates allowed on city property under the city levy exceeded the interest and penalties upon city property under the city levy by the sum of \$30,840.24; that said rebates were chargeable to the various funds of Kansas City, Kansas, but that by mistake and misinterpretation of the law, the said rebates were not charged to the various funds of the City of Kansas City, Kansas, but were charged to the county general fund; that by said mistake in said charge the city was paid \$30,840.24 in excess of the amount of taxes collected on city property under the city levy; that the Board of County Commissioners of Wyandotte County, Kansas, ascertained said mistake and the amount thereof and repudiated said charge and made an order upon the County Clerk and the County Treasurer to correct said mistake upon the books of the County Treasurer; that the County Clerk of Wyandotte County, Kansas, corrected said mistake upon his book by charging the defendant, Samuel Stewart as County Treasurer, with said sum; that thereupon and before the institution of this proceeding the defendant, Samuel Stewart, corrected said entries and charged back to the various funds of the plaintiff city the sums so overpaid to the city in said funds.

And these defendants further say that the collection of delinquent taxes for the years 1909, 1910 and 1911 for the various funds of the plaintiff city was sufficient to offset these amounts and therefore did not deplete or reduce the income of the city from its levy for the current year.

And these defendants further say that the payment by the county of the rebates allowed upon city property would be compelling residents of Wyandotte County outside of Kansas City, Kansas, to pay a part of the city taxes of Kansas City, Kansas, which would be unjust and illegal.

The defendants further answering say that the defendant, Samuel Stewart, as County Treasurer, has paid and distributed to the City of Kansas City, Kansas, at regular and stated intervals all sums of money collected upon the levy made by the said City of Kansas City, Kansas, and that he has in his possession no money belonging to said Kansas City, Kansas, other than such as has been collected since the last distribution and that the same will be distributed and paid when the regular time occurs therefor.

Wherefore defendants pray judgment for their costs herein most wrongfully expended.

KEPLINGER & TRICKETT,

Attorneys for Defendants.

Defendant here offers in evidence Answer of Samuel Stewart, in case 465-A, which was received and read subject to objection, and is as follows, to-wit:

40 In the District Court of Wyandotte County, Kansas.

No. 465-A.

THE CITY OF KANSAS CITY, KANSAS, Plaintiff,

v.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas.

Return and Answer to Alternative Writ of Mandamus.

Comes now the respondent Samuel Stewart and returns the alternative writ of mandamus herewith and for answer and return thereto says:

That this respondent admits that the City of Kansas City, Kansas, is a municipal corporation and a city of the first class, and admits that the respondent is the duly elected, qualified and acting Treasurer of Wyandotte County, Kansas, and this respondent denies each and every other allegation and statement in said alternative writ of mandamus contained.

And this respondent further answering said alternative writ of mandamus says:

I.

1. The writ is defective in matter and substance.
2. The writ does not contain statements of fact sufficient to warrant the issuance of a writ of mandamus.
3. The relator has a plain and adequate remedy in the ordinary course of law.
4. There is no liability on the part of the respondent to the relator.
5. The writ upon its face shows that the amount is disputed and in controversy and therefore a writ of mandamus will not lie.
6. The writ upon its face shows that an accounting is necessary and therefore the writ of mandamus will not lie.
7. The writ upon its face shows that a judicial question is presented and that the same has not been determined in any action between the relator and respondent by any court and therefore a writ of mandamus should not issue.
8. The writ upon its face shows that the Board of County Commissioners of Wyandotte County, Kansas, claims rights and benefits and that the granting of a writ of mandamus would be in the nature of precluding and adjudicating their rights by an action to which they are not a party and that where the rights of parties are involved and such parties are not before the court, a writ of mandamus should not issue.
9. The alternative writ calls for a summing up of an immense number of separate transactions attended by a computation of interest on each and a determination of the portion of each separate assignment or redemption due to the relator and extends back through a number of years and through the terms of office of different officers and presents a case for the determination of which mandamus is not an appropriate remedy.

II.

And the respondent further answering says that there is another action pending in this court entitled "The City of Kansas City, Kansas, v. The Board of County Commissioners of Wyandotte County, Kansas, and Samuel Stewart, County Treasurer of Wyandotte County, Kansas," in which the same issues are involved that are involved in this suit; that said cause is numbered 10438, Court of Common Pleas of Wyandotte County, Kansas, which is now the third division of the District Court; that a copy of the petition filed by the plaintiff in said case is hereto attached, marked Exhibit "A" and made a part hereof as though fully set out herein.

That the defendant has answered in said case, a copy of which said answer is hereto attached, marked Exhibit "B" and made a part hereof as though fully set out herein.

That said cause is pending and undetermined and that in said case every issue involved in this case can be settled and determined and that said case is the proper case in which to try the issues between the relator and respondent.

III.

And the respondent further answering says that the taxes for the year 1913 called for in the alternative writ have not been levied nor have the same been collected, and that there is nothing in the hands of the respondent for the relator or any other person.

That the taxes for the year 1912 have not been collected and that property owners have until about the 20th of June, 1913, in which to pay the same and that until said taxes are collected and apportioned, it is impossible for respondent to ascertain or determine what amount, if any, is due to the relator.

That as to the taxes for 1910 and 1911 this respondent has accounted to the relator for all sums collected for it and that there is no money in his hands or under his control belonging to the relator.

IV.

And this respondent further answering says that so far as he is able to ascertain the object and purpose of this suit, it is an attempt to compel respondent to pay to the relator a sum in excess of the amount of taxes collected upon said property for the relator; that there is a controversy pending between the City of Kansas City, Kansas, and the Board of County Commissioners of Wyandotte County, Kansas, as to the fund to which shall be charged the rebates allowed by law upon city property.

The relator herein demands that the respondent shall charge all rebates upon city property to the county's general fund and the Board of County Commissioners contend that respondent should charge rebates upon city property to the account of the city. The Board of County Commissioners of Wyandotte County, Kansas, contends that to take out of the county's general fund a sum sufficient to pay to the city the sum not collected by reason of rebates, is compelling farmers and other residents of Wyandotte County, Kansas, outside of the City of Kansas City, to pay a part of the taxes of Kansas City, Kansas, and said Board of County Commissioners contends that this respondent has no right or authority to pay to the City of

Kansas City, Kansas, any sum in excess of the amount collected, and this respondent further says that the Board of County Commissioners ordered and directed the County Clerk to charge upon the books and against the relator all rebates allowed upon city property under the city levy and that the County Treasurer made such charge and that this respondent has no power or authority to change or alter such charge.

V.

And this respondent further says that by reason of the controversy between the Board of County Commissioners of Wyandotte County, Kansas, and the relator, that this respondent cannot safely pay to the relator any sum asked for by the relator without becoming individually liable therefor.

And respondent further denies that the recovery of any sum is necessary for the relator by reason of its budget for the year 1912, and respondent says that the collection of delinquent taxes for the years 1909, 1910 and 1911 are more than sufficient to offset these amounts and therefore do not deplete or reduce the income of the city from its levy for the current year. And respondent further says that all of the acts herein related and the charge made upon the books by the County Clerk under order of the Board of County Commissioners was made prior to the institution of this suit and that this respondent has no money in his hands or under his control and that it is absolutely impossible for him to pay to the relator the rebates for the years 1909, 1910 and 1911 without a warrant drawn therefor by the Board of County Commissioners of Wyandotte County, Kansas.

45

VI.

And the respondent further answering says that he has paid and distributed to the City of Kansas City, Kansas, at regular and stated intervals all sums of money collected by the levy made by the said City of Kansas City, Kansas, and that he has in his possession no money belonging to said Kansas City, Kansas, other than such as has been collected since the last distribution and that as soon as the clerks can distribute the same it will be paid to the City of Kansas City, Kansas, if these funds, if any, belong to it, as soon as said fact can be ascertained and the time for payment under the law arrives.

VII.

And this respondent further answering says that any statute or enactment that requires or results in requiring property owners outside of Kansas City, Kansas, to pay any portion of the taxes of Kansas City, Kansas, is unconstitutional and void and respondent further says that any law requiring respondent to take from the county's general funds any sum to make good the rebates upon city property is unconstitutional and void; that the same would be unjust and unequal and depriving residents outside of Kansas City, Kansas, of their property without just compensation.

Wherefore respondent having fully answered all the statements in the alternative writ prays judgment for his costs herein most wrongfully expended.

KEPLINGER & TRICKETT,
Attorneys for Respondent.

46 STATE OF KANSAS,
Wyandotte County, ss:

Samuel Stewart, being first duly sworn on oath, says that he is the duly elected, qualified and acting Treasurer of Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing answer and return to the alternative writ and that the matters and things therein stated and set forth are true and correct as he verily believes.

SAMUEL STEWART.

Subscribed and sworn to before me this 31st day of May, 1913.

[SEAL.]

MADELON DEROCHE,

Notary Public.

My commission expires January 11, 1916.

Mr. Trickett: We also offer in evidence the affidavit of Frank M. Holcomb as County Clerk.

Mr. Higgins: We object to the reception of this affidavit for the reason it is neither competent, relevant nor material, and the further reason the matters therein related are conclusions of law and not statements of fact and for the additional reason that the principal parts stated in the affidavit are a conclusion as to the amount of a so-called over-payment by the County to the City, amounting to the sum of \$30,840.24, upon which the City does very strenuously object to the conclusion that this is the amount that is paid in excess of interest and penalties for the reason we have never had an audit on that matter, and we would object to any evidence being introduced in this case to preclude or shut off an inquiry into that question. Whether that is the whole amount or it is a lesser
47 amount, I don't want to be bound. I am not objecting for the reason it is not the best evidence.

Mr. Trickett: The Court is not bound by any conclusion stated by any witness; I offer this instead of bringing Mr. Holcomb over.

The Court: If you make the last objection——

Mr. Higgins: I don't want to make the last objection. I will make it in order to keep the affidavit out, rather than be bound by what he says in it, rather than have any adjudication upon this point because that is something we want to have an opportunity to check up. We are not prepared to contest it, and it is not important in this case, although if it should go in, it might become binding upon the City.

Mr. Trickett: In bringing a mandamus suit in the first instance the burden would be upon the plaintiff to establish the amount. This amount of \$30,840.24 was obtained by an Accountant employed by the County auditing the books. Of course, if there was any error, they would not be bound by it, and we are offering this affidavit just as though the witness was here on the stand to show what he did, and what was done with respect to that matter of the order that was made by the Board of County Commissioners and as to any conclusion of his, of course, the Court would not be bound by it. I am not asking it on the basis of precluding any question of res judicata, if there is any error of omission.

Mr. Keplinger: I do not believe it would have that effect.

The Court: Let that statement go in the record.

48 Mr. Keplinger: It is not offered for the purpose of showing conclusively that is the correct amount.

Mr. Higgins: You mean by this affidavit to show that the County ascertained this amount to be this sum in their judgment. It is only for the purpose of showing the good faith in which the county acted, rather than to show this is the correct amount?

Mr. Trickett: And for the further purpose of showing just what was done by the County Clerk with respect to the books of the County.

Mr. Higgins: Then I withdraw the last portion of my objection.

The Court: The part of the objection withdrawn is that it is not the best evidence.

Mr. Higgins: Yes.

The Court: The objection is then overruled.

Said affidavit was thereupon received and read in evidence and (omitting caption) is as follows, to-wit:

Affidavit of Frank M. Holcomb.

STATE OF KANSAS,

Wyandotte County, ss:

Frank H. Holcomb, being first duly sworn, on oath says that he is the duly elected, qualified and acting County Clerk of Wyandotte County, Kansas, and has been County Clerk for many years.

And affiant says that in the collection of taxes for the City of Kansas City, Kansas, under the law, a rebate is allowed each taxpayer upon the last half of his taxes if the whole sum is paid in December.

49 And affiant further says that the City of Kansas City, Kansas, for the years 1909, 1910 and 1911, was paid a sum in excess of the amount actually collected as shown by Exhibit "A" attached to the affidavit of Samuel Stewart filed in this cause, and that said excess or over-payment was charged to the county's general fund by the County Treasurer, that at the request of the Board of County Commissioners, this affiant caused to be ascertained the amount of such over-payment, and did so ascertain the same and that said over-payment is shown by said Exhibit "A" herein referred to.

And affiant says that upon the ascertaining of said amount the said Board of County Commissioners protested against the charging of said sum or any part thereof to the county's general fund and passed an order claiming a return of the same and that this affiant upon the books of his office made the proper entries for the return of said sum to said County and that said return of money was made prior to the institution of this suit, and that the same has been returned and paid to the County under and by virtue of said order and under and by virtue of the laws of the State of Kansas, and that the County Treasurer has not said money in his possession or under his control so as to return the same and could not pay the same to the plaintiff City except upon a judgment rendered in a proper case upon a warrant drawn therefor by the Board of County Commissioners.

And further affiant saith not.

FRANK M. HOLCOMB.

Subscribed and sworn to before me this 28th day of January, 1913.

27

JOHN T. SIMS,
Probate Judge.

[SEAL.]

Mr. Trickett: We offer in evidence the affidavit of Samuel Stewart, together with Exhibit "A" attached thereto.

Said affidavit was thereupon received and read in evidence on, and being the same affidavit of said Samuel Stewart hereinbefore fully set out on Page 13 of this transcript, and a copy of which is here omitted.

LOUIS B. HOLCOMB, called, sworn and examined on behalf of defendant:

By Mr. Trickett:

Q. What official position do you occupy?

A. Deputy County Clerk.

Q. How long have you been Deputy County Clerk?

A. Since 1901.

Q. I will ask you if within a recent period, the County had employed a public accountant or special examiner?

A. Yes.

Q. What was his name?

A. L. E. Crawford.

Q. I hand you Exhibit "4" and ask you if that is the report by the special accountant?

A. Yes.

Q. I will ask you if that report was filed in your office?

A. Yes.

Q. Upon what date?

A. August 12th, 1912.

Q. Now, I especially call your attention to pages marked "D" and "D-2," and I will ask you if at my request you verified
51 the correctness of those statements?

A. Yes, I verified them.

Mr. Trickett: We offer in evidence the two pages marked "D-1" and "D-2."

Mr. Higgins: I have no objection to Mr. Holcomb stating his own information and own knowledge in a form that may be competent, but I object to the reception of the report for the reason it is neither competent, relevant nor material and not the best evidence. Mr. Crawford himself would be the man to determine with reference to those facts. I understand what Mr. Trickett wants to prove is that on a certain specific piece of property the amount of county tax was a certain number of cents and the rebate paid on account of the City's proportion was a lar-er amount, therefore tending to show that the County had to pay out of its general fund the City's proportion of taxes, they would have to pay out more than they received.

Mr. Trickett: I did not care about any other part of this report except these two pages I spoke of. It will be noticed it mentions specific lots and blocks and items of taxes on those lots and amount of rebate paid for the City and these are offered in evidence simply to bring pointedly before the Court and get into the record the fact that if the County paid the rebate of the City on these properties

they are paying part of the special improvement taxes, and going down into their pockets and paying more than they receive.

The COURT: The objection will be overruled.

Q. (Reading to witness first item on page "D-1") Now, I will ask you, Mr. Holcomb, if you further examined, and whether
52 or not there was a large amount of City property the same as this.

Objection overruled.

A. Yes, there are thousands—I don't know any stated number, but hundreds of cases on the tax roll similar to that.

Cross-examination by Mr. Higgins:

Q. It is a fact, is it not, that the County has not paid any interest and penalties to the City on the taxes collected during the past few years?

Objected to by defendant as not cross-examination.
Overruled. Exception.

A. The County has paid to the City in the past few years what is their share of the interest and penalties.

Mr. Higgins: I move to strike that out as a conclusion of the witness.

The Court: Where he says the County has paid, will stand, the rest will be stricken out.

Q. What interest and penalties has been paid by the County to the City during the past few years, upon taxes; what years have they paid to the City interest and penalties upon, please state the facts?

Objected to by defendant as not cross examination, and the witness having nothing to do with the payment by the County Treasurer to the City Treasurer.

The Court: He may answer, if he knows. Defendant excepts.

53 A. The apportionment, of course, is made by the County Treasurer, the distribution is all made by the County Treasurer of those things.

Q. When you answered, then the question I asked you that the County has paid this, you testified then to something you knew nothing about?

A. I mean the Treasurer's reports will show he has paid those moneys over to the City.

Q. Isn't it a fact for the money he sends down to the City he writes on the receipt he asks the City to sign, that this amount does not include interest and penalties?

A. I know nothing about that.

Q. Aren't those receipts filed in your office?

A. I never have seen one of them marked that way.

Q. The law requires them to be filed?

A. They are filed in our office: we have a duplicate of every one that goes to the City, but I never noticed that statement on them.

Q. How do you keep the books in your office, if you do not keep track of the amounts paid to the City?

A. We do keep track of them.

Q. Have you got those books—are those books available to you now?

A. Sure.

Q. Will you please produce those and tell whether or not the County has been paying interest and penalties to the City during the course of the past few years?

A. The amount is not set out separately.

Q. Why not?

A. The County Treasurer don't report it that way; we accept his distribution.

Q. You do not want to be understood as telling this Court
54 that in every case where the County collected taxes for the City that the rebates in every case amount to more than the County's proportion of taxes collected against the pieces of property?

A. No; there are hundreds of cases where it does.

Q. How many tracts of land are there in Kansas City, Kansas?

A. How many, including lots?

Q. Yes?

A. I don't remember that amount.

Q. About 20,000?

A. There is more than that.

Q. So that out of a few hundred cases—there are a few hundred cases out of more than 20,000?

A. Of course that is just a guess, I do not know; we could determine.

Q. You have made a list here of certain lots upon which the taxes charged against this property—that is, the County's taxes charged against this property was less than the amount of rebate allowed on account of the payment of the City taxes?

A. Yes.

Q. Now, is it a fact all of this tax was paid, or that any of it was paid?

A. These were taxes where they were paid. Of course we could not show a rebate unless they were paid.

Q. Isn't it a fact the list you have in there constitutes the entire list in which taxes were paid in which that condition obtained?

A. No, I think there could be a good many more added to that.

Q. But in a great many cases of those hundred instances you speak of that is property that does not pay its taxes?

55 A. Of course that would cover a great many of them where it was not; still if you take the rebates and run through them you can run on a hundred cases or more; we only picked up a few cases here and there to show the items.

Q. You usually find that condition prevailing where you have a cheap piece of property that has charged against it special taxes. That is usually where you find that condition prevailing?

A. No; of course you will find it there, but you also will find it, for instance, where you have a nice property vacant, and a great many special taxes, it will occur there always where it is vacant.

Q. You will never find a single case where the rebates are in excess of the County's proportion of taxes against a property; that will only prevail where there is special?

A. Oh, yes.

Witness excused.

Said pages of said report above referred to as being "D-1" and "D-2" were received and read in evidence on behalf of the defendant, and are hereto attached, and — as follows, to-wit:

To illustrate still further the inequity of the rebates, the following cases in which payment was actually made and in which the rebates were actually allowed are given, to-wit:

Lot 30, Block 86, Wyandotte; Valuation, \$400.00.

From 1910 Tax Rolls.

General tax	\$7.20	
Street sidewalk	23.88	
Street grading	13.26	Contributed to County General Revenue Fund, 72 cents.
Drainage, paving, grading and sewer	10.80	
Total	\$55.14	
Rebate	1.37	Rebates exceed total payment to Co. Revenue Fund, 65 cents.
Paid	\$53.77	

Lot 31, Block 86, Wyandotte; Valuation, \$350.00.

General taxes	\$6.30	
Street sidewalk	23.89	
Street grading	13.26	Contributed to County General Revenue Fund, 63 cents.
Drainage, paving, grading and sewer	10.50	
Total	\$53.95	
Rebate	1.34	Rebates exceed total payment to Co. Revenue Fund, 71 cents.
Paid	\$52.61	

Lot 8, Block 98, Wyandotte; Valuation, \$240.00.

General tax	\$4.32	
Street grading	7.74	Contributed to County General Revenue Fund, 43 cents.
Drainage, paving, grading and sewer	8.50	
Total	\$20.56	
Rebate51	Rebates exceed total payment to Co. Revenue Fund, 8 cents.
Paid	\$20.05	

Lot 2, Block 5, Heathwood; Valuation, \$500.00.

General taxes	\$9.00	
57 Curbing, paving, grading and sewer	38.60	Contributed to County General Revenue Fund, 90 cents.
Total	\$47.60	
Rebate	1.19	Rebates exceed total payment to Co. Revenue Fund, 29 cents.
Paid	\$46.41	

Lot 1, Block 5, Heathwood; Valuation, \$1,900.00.

General taxes	\$34.20	
Sidewalk	77.33	Contributed to County General Revenue Fund, \$3.42.
Curbing, paving, grading and sewer	41.67	
Total	\$153.20	
Rebate	3.83	Rebates exceed total payment to Co. Revenue Fund, 41 cents.
Paid	\$149.37	

Lots 23 and 24, 124 Wyandotte; Valuation, \$700.00.

General taxes	\$12.60	
Curbing, paving, grading and sewer	45.00	Contributed to County General Revenue Fund, \$1.26.
Total	\$57.60	
Rebate	1.44	Rebates exceed total payment to Co. Revenue Fund, 18 cents.
Paid	\$56.16	

W. 1/2 N. 15 feet Lot 18 and W. 1/2 Lot 19, Block 6, Heathwood; Valuation, \$500.00.

General tax	\$9.00	
Benefit	11.50	Contributed to County General Revenue Fund, 90 cents.
Curbing, paving, grading and sewer ..	22.60	
58 Total	\$43.10	
Rebate	1.07	Rebates exceed total payment to Co. Revenue Fund, 17 cents.
Paid	\$42.03	

lots 20, 21, and 22, Block 7, Heathwood; Valuation, \$850.

General tax.....	\$15.30	
ing, paving, curb-		Contributed to County Gen-
g and sewer	64.85	eral Revenue Fund, \$1.53.
Total	\$80.15	
te	2.00	Rebates exceed total to Co.
		Revenue Fund, 47 cents.
Paid	\$78.15	

lots 4 and 5, Block 13, Heathwood; Valuation, \$750.00.

General tax.....	\$13.50	
ing, paving, grad-		Contributed to County Gen-
g and sewer.....	37.55	eral Revenue Fund, \$1.35.
Total	\$51.05	
te	1.27	Total payment to Co. Reve-
		nue Fund exceeds rebates 8
		cents.
Paid	\$49.78	

5, 16, and 17, Block 1, Elevated Road No. 2; Valuation, \$1,200.00.

General taxes.....	\$21.60	
alk	52.41	Contributed to County Gen-
ng, paving, grad-		eral Revenue Fund \$2.16.
g and sewer.....	37.50	
Total	\$111.51	
Rebate	2.78	Rebates exceed total payment
		to Co. Revenue Fund, 62 cents.
Paid	\$108.73	

0, 41, and 42, Block 10, West Lawn; Valuation, \$1,500.00.

General tax.....	\$27.00	
grading	12.40	Contributed to County Gen-
ng, paving, grad-		eral Revenue Fund, Fund, \$2.70.
and sewer.....	60.65	
Total	\$100.05	
e	2.50	Payment to Co. Revenue Fund
		exceeds rebates 20 cents.
Paid	\$97.55	

Lot 39, Block 1, Feree Place; Valuation, \$250.00.

General tax.....	\$4.50	
Sidewalk	17.56	Contributed to County Gen-
Curbing, paving, grad-		eral Revenue Fund, 45 cents.
ing and sewer.....	9.30	
Total	\$31.36	Rebates exceed total payment
Rebate78	to Co. Revenue Fund, 33 cents.
Paid	\$30.58	

Lots 10, 11, and 12, Block 4. Riverview Heights; Valuation, \$1,600.00.

General tax.....	\$28.80	
Sidewalk	94.05	Contributed to County Gen-
Curbing, paving grad-		eral Revenue Fund, \$2.88.
ing and sewer.....	11.75	
Total	\$134.60	Rebates exceed total payment
60 Rebates	3.36	to Co. Revenue Fund, 48 cents.
Paid	\$131.24	

A. J. HOFFMAN, called, sworn and examined on behalf of the defendant, as follows, to-wit:

By Mr. Trickett:

Q. What official position do you occupy?

A. Clerk in the Treasurer's office temporarily.

Q. Formerly what official position did you hold?

A. County Commissioner.

Q. You were Chairman of the Board of County Commissioners for how long?

A. Two years.

Q. You have charge of the books of the County Treasurer?

A. Yes, the distribution of taxes, especially.

Q. I will ask you if you know the amount of the total levy of the City of Kansas City, Kansas, for 1911?

Mr. Higgins: Objected to as neither competent, relevant, immaterial and not tending to prove any of the issues in this cause.

Mr. Trickett: They allege they had a budget and made a levy to raise a certain sum of money and that they did not get that amount of money; I am offering this evidence to show the amount of their levy and that they have received from the County more than their levy.

The Court: Objection sustained; I do not think it makes any difference whether they got so much money or not.

61 Mr. Trickett: Then I think that allegation about the budget should be stricken out.

The Court: I do not think that part of the writ has got anything to do with this case; it is merely a question as to whether the County or the City is entitled to this money. The objection is sustained. Defendant excepts.

Mr. Trickett: We offer to prove by this witness on the stand that the total levy for the City for general fund for the year 1911 was \$732,000, and that there was collected and turned over to the City between the months of October 1st, 1911, and October 1st, 1912, the sum of \$747,341.13. We further offer to show by the witness in the chair that the total levy for the year 1912, was the sum of \$603,000, and that there has been collected and turned over to the City upon that levy the sum of \$593,547.17, and that there will be collected between now and the first day of October about the sum of \$60,000, making an excess of \$50,000 over and above the levy of the City.

Mr. Higgins: To all of which the City objects as neither competent, relevant, material and as not the best evidence.

Objection sustained.

Defendant excepts.

Q. Now, Mr. Hoffman, this alternative writ calls for an order directing the Treasurer to pay over to the City taxes for the year 1913. I will ask you if there have been any taxes collected for 1913.

Mr. Higgins: We object to this as neither competent, relevant nor material and not being within the knowledge of this witness.

By the Court: Objection sustained; the Court will take judicial notice the 1913 taxes are not due yet.

Defendant excepts.

Q. I will ask you whether or not the County Treasurer has paid to the City all of the taxes collected for year 1912.

Mr. Higgins: Objected to as a conclusion and neither competent, relevant nor material and going into collateral matters.

Objection sustained.

Defendant excepts.

Q. I will ask you to state if the County Treasurer has paid over to the City all moneys collected for the City for the year 1911.

Objected to as calling for a conclusion and opinion of the witness, and incompetent, irrelevant and immaterial.

Objection sustained by the Court.

Defendant excepts.

Q. I will ask you if the County Treasurer has paid over to the City of Kansas City, Kansas, all taxes collected for the year 1910?

Same objection by plaintiff.

Sustained exception.

Q. I will ask you the same question with respect to the taxes for the year 1909?

Objection same as before.

Sustained.

Defendant excepts.

63 Q. You have charge of the matter of the distribution of all taxes collected, and the payment to the city?

A. Yes.

By the Court:

Q. How long have you had charge of that?

A. The distribution since last November.

Q. You have before you and in your possession, and have you examined the books showing the collections and distributions of prior months and years?

A. I have, yes.

Q. I will ask you if prior to the commencement of this suit if the entries had been made as shown by the order of the Board of County Commissioners and the charges made to the various funds of Kansas City, Kansas?

A. Yes, sir.

Q. I will ask you if that money was credited to the County General Fund?

A. It was not.

Q. Was that money paid in the County's General Fund?

A. No, sir.

Q. Where was it paid?

A. In a special fund.

Q. But the cash itself is in the County fund, is it?

A. Well, it is together with the County money deposited in the bank.

Q. I will ask you if it would require a warrant signed by the Board of County Commissioners before the Treasurer could pay out that money?

Mr. Higgins: I object to that as asking the witness for a conclusion of law.

Objection sustained.

Defendant excepts.

64 Cross-examination:

Q. Did you make out the receipts sent down to the City Treasurer's office with the money?

A. No, sir.

Q. In the distribution of these taxes, since you have been in the Treasurer's office you distribute the taxes between the County, State and various municipalities?

A. Yes.

Q. Do you have charge of the distribution of delinquent taxes?

A. Yes, sir.

Q. Do you ascertain the amounts that the City should be paid on account of the collection of delinquent taxes?

A. Yes.

Q. In making that ascertainment and finding, have you since November of 1912 credited to the City on account of the collection of delinquent taxes any part of the interest and penalties collected?

Mr. Trickett: To which the respondent objects as not cross examination.

Objection sustained.

Defendant excepts.

Witness excused.

Certificate of Official Stenographer.

STATE OF KANSAS,

County of Wyandotte, ss:

I, Fred T. Leport, hereby certify that I am the duly appointed, qualified and acting official Stenographer of Division No. 3, District Court of Wyandotte County, Kansas; that as such stenographer I reported all the oral and written evidence and proceedings in a certain cause pending in said Court wherein the City of Kansas City, Kansas, was plaintiff, and Samuel Stewart, County Treasurer of Wyandotte County, Kansas, was defendant, and numbered "465-A" in said Court, and that the above and foregoing pages, numbered "1" to "55" inclusive, contain a true and correct transcript of all such oral and written evidence and proceedings, as the same was so reported and by me transcribed from the files and record in my office.

Witness my hand attested by the seal of said Court this 23rd day of September, A. D. 1913.

[SEAL.]

FRED T. LEPORT,

Official Stenographer, 3rd Division, District Court.

Attest:

R. J. McFARLAND, *Clerk,*

By C. S. THOMAS, *Deputy.*

Certificate of Counsel for Appellant.

STATE OF KANSAS,

County of Wyandotte, ss:

We, the undersigned, L. W. Keplinger and C. W. Trickett, counsel for appellant, do hereby certify that the above and foregoing transcript of evidence contains all of the evidence in said case except a large number of receipts which counsel do not believe are material in this case and we have included a copy of two of said receipts and the other receipts are of the same general nature.

And we further certify that in this case a notice of appeal was duly served upon counsel for appellee and duly filed in said case and all steps necessary for appeal duly taken.

Witness our signatures this 25th day of September, 1913.

L. W. KEPLINGER,

C. W. TRICKETT,

Attorneys for Appellant.

And afterwards on the 10th day of October, 1913, the same being one of the regular judicial days of the July term, 1913, the Supreme Court of the State of Kansas, before the said court

in session at the Supreme Court room in the city of Topeka, the following proceedings among others was had, and entered of record as follows, to-wit:

68 In the Supreme Court of the State of Kansas, Friday,
October 10, 1913.

No. 18979.

CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, County Treasurer of Wyandotte County,
Appellant.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of Div. 3 of the Wyandotte District Court; thereupon after oral argument by C. W. Trickett for the appellant, and by R. J. Higgins for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

69 And afterward on the 29th day of October 1914, the same being one of the regular judicial days of the July term 1913, of the Supreme Court of the State of Kansas, before the said court, in session at the supreme Court room in the City of Topeka, the following proceedings among others was had, and entered of record as follows, to-wit:

70 In the Supreme Court of the State of Kansas, Wednesday,
October 29, 1913.

No. 18979.

CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Appellant.

Journal Entry of Order Permitting County to Plead.

The defendant argues that the alternative writ should have been quashed because the board of county commissioners has not been made a party. The court assumes that the county treasurer is defending for the county and does not regard the making of the board a formal party as necessary to jurisdiction, but thinks that the board, as the representative of the county, being the claimant of the fund in controversy, is entitled to be heard in the matter, in its own name, if it so desires. Notice will be given to the county attorney and the chairman of the board of county commissioners that if any argument is desired to be made by the county, additional

to that already made in the name of the county treasurer, it may be reduced to writing and filed on or before November 6th.

71 And afterward on the 8th day of November 1913, the same being one of the regular judicial days of the July term 1913, of the Supreme Court of the State of Kansas, before the said court, in session at the Supreme Court room in the city of Topeka, the following proceedings among others was had, and entered of record as follows, to-wit:

72 In the Supreme Court of the State of Kansas, Saturday, November 8, 1913.

No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, as Co. Treas., etc., Appellant.

Journal Entry of Judgment.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at \$—, and hereof let execution issue.

73 And also on said 8th day of November 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the opinion of the court in said cause, which is in the words and figures as follows, to-wit:

74 No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,

v.

SAMUEL STEWART, as County Treasurer, etc., Appellant.

Appeal from Wyandotte County (Third Division). Affirmed.

Syllabus by the Court—Mason, J.

1. The provision of the act in relation to the collection of taxes, that "all penalties shall be credited to the county fund, and all rebates charged to that fund," means that the rebates shall be charged to the county fund; and an amendment by implication which requires penalties on city taxes to be paid to the city does not prevent the rebates on the same tax being charged to the county.
2. The legislature has power to require that rebates granted on taxes laid by cities, townships and school districts shall be charged to the county.

3. A statute requiring all rebates to be charged to the county fund and all penalties to be credited to that fund, except those accruing to the taxes of cities of the first class, which shall be paid to the city, does not violate the provision of the state constitution that a tax shall be applied only to the object in pursuance of which it is levied.
- 75
4. Such a statute does not violate the fourteenth amendment to the federal constitution by depriving any person of property without due process of law, or by denying to any person the equal protection of the law.

Burch, J., Smith, J., Porter, J., West, J., concurring.
Johnston, C. J., and Benson, J., dissenting.

76

No. 18979.

The opinion of the court was delivered by—

MASON, J.:

The city of Kansas City, Kansas, brought mandamus against the treasurer of Wyandotte county, to require him to pay money over to the city in accordance with the terms of certain statutes. Judgment was rendered for the plaintiff, and the defendant appeals.

The question in dispute concerns the disposition of the penalties imposed by law for delinquency in the payment of taxes levied by and for the city. In substance it is this: Is the county required to reimburse a city of the first class for the amount by which the taxes collected for the city are reduced by rebates granted for prompt payment, and at the same time to pay over to the city the amount collected as penalties for delay in the payment of taxes levied by the city, while in the case of taxes levied by cities of the second and third classes, and by townships and school districts, the rebates are charged to the county and the penalties credited to it?

In 1874 a system of tax collection was adopted (Laws 1874, ch. 131, Sec. 1) by which one half of a tax was made nominally due on December 20, and the other six months later. If the whole tax was paid by December 20 a rebate of five per cent was allowed on the half due in June. If none of the tax was paid until after December 20, the whole amount became due and a penalty of five per cent was added. A like penalty was added in March, and again in June, if the delinquency was continued. This system remains in force, the March penalty however having been eliminated. (Gen. Stat. 1909, Sec. 9428.) This proviso of the present statute was added in 1876: "Provided, all penalties shall be credited to the county fund, and all rebates charged to the same fund." In 1895 the legislature amended a section of the statute, which fixed the time of settlement and the method of keeping accounts, between the county treasurer and a city of the first class, by adding to the clause requiring the treasurer to pay to the city, at certain dates, all moneys collected for it, these words: "its proportion of penalties and interest." (Laws 1895, ch. 260, Sec. 1.) This was elaborated in 1903 into: "and the

77 city's proportion on all penalties and interest collected on all taxes and special assessments." (Laws 1903, ch. 122, Sec.

36.) In this form it is a part of the present statute. (Gen. Stat. 1909, Sec. 1000.) The interpolation in its original form was held to mean that the county treasurer shall pay to cities of the first class all penalties collected for delinquencies in the payment of taxes levied by the city, while in the case of school districts (and presumably in the case of cities of the second and third classes, and townships) the penalties were still to be turned into the county fund. *Sedgwick County v. Wichita*, 62 Kan. 704, 64 Pac. 621.) Upon the strength of that ruling the city of Kansas City demands the penalties accruing from delay in the payment of its taxes. The county treasurer resists the demand upon various grounds.

It is suggested that in the sentence "All penalties shall be credited to the county fund, and all rebates charged to the same fund," the second clause originally meant that rebates should be charged to the same fund that was credited with the penalties; and that when a change was made in the beneficiary of the penalties accruing on city taxes—crediting them to the city instead of to the county—a like change was effected in the fund to which city rebates should be charged. This interpretation might seem to reach a more equitable result, but we are of the opinion that the language quoted was intended to mean that the penalties are to be credited to the county fund and the rebates charged to that fund—the same fund—the county fund. This intention seems too obvious to permit of a different reading.

The defendant maintains that under this construction the statutes violate the provision of the state constitution requiring a tax to be applied only to the object in pursuance of which it was levied (Const. Art. 11, Sec. 4), and also violates the first paragraph of the fourteenth amendment to the federal constitution in that it deprives tax payers of the county who reside outside of the city, of property, without due process of law, and denies to them the equal protection of the law.

The question with regard to the state constitution was raised and passed upon in the *Sedgwick county* case already cited.

It was there argued, and the argument was approved in a dissenting opinion, that the penalty was a part of the tax and could be applied to no other purpose than that for which the tax was levied. The court held however that while the penalty was to be regarded as a part of the tax for certain purposes, and would ordinarily attach to the original tax, and be disposed of in the same way, the legislature may direct a different disposition. The court now adheres to that law, which finds some support in the text and the cases cited in 37 Kan. 1594, and which is thus elaborated, although with regard to a different constitutional provision, in *New Whatcom v. Roeder*, 22 Kan. 570, 61 Pac. 767;

It will be observed that the legislature, and not the municipality, fixes the date of the delinquency and the interest charge; in other words, creates the delinquent fund arising from this source. In tax penalties proper and interest charges are imposed for mere delinquencies in order to hasten payment. The general law of the state imposes this charge as a penalty for neglect to pay the tax in due season. The fund arising from this source is created by the legislative act of the sovereign state, and it follows that the legislature has a right to dispose of this fund to the same extent as other fines

and penalties arising from the violation of other laws of the state."

The contention is made that to charge the county with the rebates granted with respect to the taxes of cities of the first class is in effect to levy taxes upon one public body for the benefit of another. To this we can not agree. The allowance of a rebate is in substance a reward or inducement for the prompt payment of taxes. We think the legislature may cast this incidental expense upon the county, just as it might create a county office, the occupant of which should receive a salary for visiting those liable for taxes and endeavoring to hasten their payments. The plan adopted is not different in principle from the requirement that county officers, who are paid wholly from the county treasury, shall collect city, township and school district taxes.

79 "Counties are purely the creation of state authority. They are political organizations, whose powers and duties are within the control of the legislature. That body defines the limits of their powers, and prescribes what they must and what they must not do. It may prescribe the amount of taxes which each shall levy, and to what public purpose each shall devote the moneys thus obtained." (State v. County of Shawnee, 28 Kan. 434.)

The argument that the federal constitution is violated is founded upon the theory that the statute discriminates between the residents of a city and the residents of the county outside of the city, to the disadvantage of the latter, and that there is no reasonable basis for such a classification in this connection. The statute in effect requires the county to pay all rebates, which, as already said, are rewards for the prompt payment of taxes. The penalties for delay in the payment of taxes levied by a city of the first class go to the city, and its taxpayers alone are thereby benefitted. The penalties for delay in the payment of other taxes go to the county, and the taxpayers of the city share the benefit with the taxpayers of the county. This does result in a measure of discrimination between the taxpayers of the city, and those of the rest of the county, to the disadvantage of the latter. In State v. Mayo, 15 N. D. 327, such a discrimination was held to violate a provision of the state constitution forbidding the granting of any privilege or immunity to one citizen or class of citizens which is not granted on the same terms to all. Incidentally it may be mentioned that that case approves the decision of this court that the legislature may control the disposition of penalties imposed for delinquency in respect to the payment of taxes.

We do not think the arrangement in question amounts to a classification which is so clearly without any reasonable basis that it must be held to be beyond the power of the legislature. It may not be easy to say just why one rule should be applied with respect to penalties for delay in the payment of taxes levied by a city of the first class, and another with respect to those for delay in the payment of the taxes levied by a city of the second or third class, or by a township or a school district.

80 To uphold the law however it is not necessary that the court should be able to find the reason for the distinction. The statute must stand unless the court can say it is clear that no sufficient reason can possibly be found. Many differences exist in

the methods of governing cities of the various classes, for which it would be difficult to find a specific reason having relation to the number of inhabitants—the sole basis of their classification. The discretion of the legislature in the matter of taxation is especially broad. (4 Encyc. of U. S. Sup. Ct. Rep. 403.) And its control of municipalities of its own creation is subject to few restrictions.

"Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the legislature has undoubted power to apportion a public burden among all the taxpayers of the State, or among those of a particular section." (*Railroad Company v. County of Otoe*, 83 U. S. 676.)

"Very wide discretion is left with the law-making power in this particular. The Legislature may change the political subdivisions of the Commonwealth by creating, changing, or abolishing particular cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways." (*Attorney General v. Williams*, 174 Mass. 476, 481; approved in *Williams v. Parker*, 188 U. S. 491, 503, 504.)

It is difficult to suggest a reason why a poll tax for road purposes should be exacted from residents of a city if it is of the second class, but not if it is of the first class. Yet this discrimination is upheld even where the court is unable to find that the persons exempted are under any specific compensating burden. (*Shane v. City of Hutchinson*, 88 Kan. 188, 192, 127 Pac. 606.) A basis for

81 favoring the taxpayers of a city of the first class by giving the city the benefit of the penalties accruing to city taxes, while other penalties are retained by the county, may perhaps be found in this consideration: The county clerk and county treasurer receive, for the benefit of the county, fees for taking various steps in connection with the sale of real estate for delinquent taxes—such as for making out notices, and for issuing tax sale certificates and tax deeds. These become in effect charges against the owners of the property. They are uniform for each tract, irrespective of value. In the larger cities there will naturally be many lots of relatively small value that will become liable for such payments. It is possible that the legislature estimated that the county would from this source derive a larger revenue, in proportion to the value, from property in cities of the first class than from that outside, and decided to give such cities the benefit of the penalties on its taxes as a means of compensating in a rough way the resulting inequality.

Various minor questions regarding procedure are raised. It is suggested that mandamus will not lie because even if the plaintiff's theory of the law is correct it had an adequate remedy at law by action on the defendant's official bond. Early decisions of this court support that view. (*State v. Bridgman*, 8 Kan. 458.) But

the rule has been changed by statute. (Laws 1901, ch. 284, Sec. 1, Civ. Code, Sec. 715.) The contention is also made that a motion to quash the alternative writ should have been sustained because the amount demanded was disputed, because the defendant was entitled to a jury trial, because an accounting was necessary, and because a judicial question was presented which had not been determined in any action between the parties. In *Board of Education v. Spencer*, 52 Kan. 574, 35 Pac. 221, it was said that mandamus was not an appropriate proceeding in which to determine an amount which depended upon the result of a long and complicated accounting, covering transactions extending over seventeen years. Here however the court did not undertake to settle any disputed amount. The purpose of the proceeding was not to ascertain what sum was due on a settlement, but to decide to what funds the

82 rebates and penalties should be charged and credited—to determine the treasurer's duty in that regard. The treasurer was ordered to pay to the city the sums due under the statute as interpreted by the court, including the penalties on city taxes for 1912 and 1913, and a specified amount which by order of the county commissioners had been charged to the city upon a different interpretation. The only substantial controversy between the parties was with regard to the effect of the statute and this question could be determined as well in mandamus as in any other proceeding. (*Riley v. Garfield Township*, 54 Kan. 463, 38 Pac. 560.) It is contended that an adjudication should not have been had without the board of county commissioners having been made a party. "Technically, in mandamus the only necessary parties are the plaintiff, who asserts the right to have an act done, and the defendant, upon whom the public duty rests to perform it. The practice is common and commendable to bring in other persons who are likely to be injuriously affected by the judgment, in order that they may have an opportunity to be heard in their own behalf, and in a proper case the court will suspend proceedings until this is done. (*Livingston v. McCarthy*, 41 Kan. 20.) (*The State v. Railway Co.*, 81 Kan. 430, 435.)" (*The State v. Dolley*, 82 Kan. 533, 535, 108 Pac. 846.) Here the county might well have been made a party. No request for such action however was made by the county or by the defendant, although the answer to the alternative writ alleged the absence of the county as a reason why a peremptory writ should not issue. In the name of the treasurer a defense upon the merits has been made, in which the interests of the county have been vigorously and ably presented. The omission formally to make the county a party is not regarded as a ground for reversing the judgment.

The judgment is affirmed.

Burch, J., Smith, J., Porter, J., and West, J., concurring.

83 BENSON, J. (dissenting):

To require the tax payers of the county outside of the city to make good to the city the rebates allowed to its tax payers while allowing the city all penalties thereon is so manifestly unjust as to

challenge a careful examination of the statutes invoked as authority, and if necessary a re-examination of the decision of this court cited to uphold the contention of the city. That a penalty is a part of the tax appears to the writer to be entirely clear. It was so held in the early cases cited in the dissent of Justice Johnston in *Sedgwick County v. Wichita*, 62 Kan. 704, 64 Pac. 621. By our statutes rebates are taken from and penalties added depending upon the time of payment. Thus the tax is diminished or augmented as the case may be, but the amounts subtracted or added are still parts of the tax. Here is an illustration. An assessment of \$1,000 is charged upon property in a city of the first class. By payment before December 20, \$975.00 discharges the obligation. If not paid at the prescribed date \$25.00 is added and the obligation becomes \$1,025. If the city suffered the reduction in the one case and gained the addition in the other, the loss would be compensated by the gain, but this writ being allowed, the loss will be made up by the county at large while the city alone enjoys the gain. Thus property outside of the city contributes for street and other improvements made by special assessments, and a part of the taxes assessed and collected for the outside municipalities upon property therein is directed from the purposes for which they were levied and applied to the payment of expenses of the city in violation of section 4 of article 11 of the constitution.

To my mind the dissent in the *Wichita* case is based upon reasons that have not been successfully assailed and the decision in that case ought to be reconsidered especially in view of the increasing injustice resulting from the act of 1903, extending the operation of the act of 1895 to special assessments.

In the opinion of the majority it is well said that it may not be easy to say why the distinction referred to should be made with respect to penalties upon taxes levied by cities of the first class, and upon those levied by other municipalities. It appears to the writer of this dissent to be not only difficult but impossible to find a reason founded upon a just classification or upon any classification that is not arbitrary or fictitious. (*Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 905.) I dissent for the reasons already stated.

Chief Justice Johnston joins in this dissent.

A true copy.

Attest:

Clerk Supreme Court.

85 And afterwards on the 28th day of November, 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a petition for a rehearing in the above entitled cause, and is in the words and figures as follows, to-wit:

In the Supreme Court of the State of Kansas.

No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Appellant.

Petition for Rehearing.

L. W. Keplinger, C. W. Trickett, Attorneys for Appellant.

In the Supreme Court of the State of Kansas.

No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Appellant.

Petition for Rehearing.

The appellant respectfully asks a rehearing in the above entitled cause, for the reason that the decision heretofore rendered is contrary to law.

88 The selection of cities of the first-class as the recipients of penalties is an arbitrary classification. If, instead, cities of the second or of the third-class or school districts had been named, the reasoning of the court would be equally applicable. Whether a classification is or is not arbitrary is a judicial question to be determined by the court rather than the Legislature. The fact that the Legislature has made the classification does not conclude the court. The practical effect of the decision would make the mere fact that the classification had been made conclusive of the right to make it. Suppose, instead of cities of the first-class, the law had said "all cities having a meandered river as boundary," the reasoning of the court could have with equal propriety been copied verbatim as basis for a decision upholding the law. Those who sought to uphold such a law might quote from the decision in this case:

"To uphold the law, however, it is not necessary that the court should be able to find a reason for the distinction. The statute must stand unless the court can say it is clear that no sufficient reason can possibly be found."

The answer would be "Very true, but the utter inability, after the most rigid investigation, to find any reason would be the best possible reason for saying there was no sufficient reason." Unless this be so, the rule which forbids arbitrary classification becomes a
89 dead letter. There can, in the very nature of things be no stronger proof that a classification is arbitrary in any case

other than the fact that no possible reason can be found. At the same time there would always be a bare possibility that there was a reason in every case. Opposing counsel were unable to suggest any reason. The court in its opinion, however, suggests a possible basis for the classification, followed by this language:

"It is possible that the Legislature estimated that the county would from this source derive a larger revenue, in proportion to the value in cities of the first-class than from that outside, and decided to give such cities the benefit of the penalties on its taxes as a means of compensating in a rough way the resulting inequality."

Such could by no possibility have been the basis for this law. The total receipts by the County Clerk and County Treasurer from the source suggested for the taxes of 1911, in Wyandotte County, was \$766.40. The total amount for that year received by Kansas City was or would be \$4,573.16. If the total receipts to the Clerk and Treasurer come from the city, such fact would be no adequate basis for a payment to the city of seven times that amount. To do so would, indeed, be an exceedingly "rough way of compensating the resulting inequality." But the actual facts are still more "rough." The total county valuation for that year was

90 \$108,899,045. Of this amount \$86,899,770 was the valuation of Kansas City property. In other words the property valuation outside of Kansas City was one-fourth of the valuation of the property inside of the city. If a like proportion existed between the portion of that \$766.40 which came from without and that which came from within the city, the portion from without the city would be \$191.50. As a matter of fact, of that \$766.40, a trifle less than \$505.00 came from within, while over \$200.00 came from without the city. These figures were furnished us by the County Clerk's office and we believe them to be correct. By reason of changes made in the tax law since the law in question was enacted, the figures may be changed somewhat, but the validity of the law will depend upon conditions existing at the time of the passage of the act.

The language of the court in *Cotting vs. Stock Yards Company*, 22 S. C. R., 83, is applicable here:

"A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital and all other powers and privileges conferred by law. It is arbitrary and wanting in reason."

True in that same case, the court says:

91 "Tax laws in their nature must be general in scope and it may often happen that in their practical application they touch one person unequally from another. But that inequality is something which it is impossible to foresee and guard against and therefore such resultant inequality does not defeat its validity."

But in this case, as in that case, the objectionable result was direct and intended. In fact it was the sole purpose. It is not only as stated in that case "a positive and direct discrimination" but is a deliberately and insidiously planned discrimination between different portions of the county.

Equal Protection of the Law.

It seems to us that the court in its opinion has overlooked the vital and controlling fact in this case. Suppose we eliminate for the time being the question of penalties, whether they are a part of the tax or not a part of the tax, the law as it stands permits the taxpayers of the city to secure a rebate upon all of their taxes if paid in December. This rebate applies to the tax for sidewalks, sewers and paving and to pay the judgment debts of the city and the interest on its bonds and all of its other debts contracted in its proprietary capacity as distinguished from its governmental capacity.

The rebates in Kansas City, Kansas, amount to about \$20,000 a year. By reason of the fact that the big institutions always pay in *in full* in December, rebates on city property are much greater than on property outside the city in proportion to the total of rebates. This writ, and the judgment of this court as announced in this case, requires the County Treasurer to put his hands into the county's general fund and take out this \$20,000 and turn it over to the city. It is thereby compelling the residents of Wyandotte County outside of Kansas City, Kansas, to contribute money for the support of the City of Kansas City, Kansas, and for the payment of its debts contracted in its proprietary capacity. In appellees' brief, they give this amount at a little less than \$3,000 a year but our contention is that the residents outside of Kansas City, Kansas, can not be required to pay \$3,000 or any other sum in satisfaction of the proprietary debts of Kansas City, Kansas. While it might be possible that a law would be valid that required a contribution from residents outside of the city to governmental affairs within the city, yet it is not possible that such a law can be valid that requires a contribution for the payment of the proprietary obligations of the city. As to all such matters its status is precisely that of a private person or corporation. We wish to emphasize the fact

that this decision compels residents outside of the city to help the city and residents of the city to pay their debts for sidewalks, for sewers, for electric lights, for water; more than that, it helps them pay the judgments rendered against the city in damage suits. It helps them pay the interest upon their bonded indebtedness. It helps them create a sinking fund to pay off their proprietary debts. We contend that a law which so does violates the Fourteenth amendment to the Constitution of the United States in two special particulars. First, it is a taking of property without compensation, and second, it denies to residents of the county the equal protection of the law.

This precise question has been decided by the United States Supreme Court in a number of cases. We quote from *Reagan vs. Farmer's Loan & T. Co.*, 14 S. C. R., 1,055:

"The equal protection of the laws which, by the Fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit

of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

The above language has been quoted, with approval over and over again. It is quoted word for word, with approval, in the case of *Coddington vs. Goddard*, 22 S. C. R. 34. It is impossible for us to imagine a case to which this language is more clearly applicable than the case at bar.

We call attention to the fact that the classification made by the act in question is based upon a classification made by another act, namely, the act classifying cities. The classification of cities is based exclusively upon population. There can be no classification which is not based upon "a substantial distinction having reference to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects excluded."

State vs. Hammer, 42 N. J. L. 435.

We recognize the fact that the fact of one city having a large population does justify very different provisions as to administration of municipal affairs, but the question whether or not the city shall receive the fund in question has nothing whatever to do with the administration of municipal affairs.

A law requiring medical practitioners in cities having a certain population to have certain qualification leaving those elsewhere exempt from such requirement or provision, or a law providing that in cities of a particular class only those under six feet in height should hold office, would be held invalid even though an application of such rule might not result in a violation of the constitutional provision which forbids the taking of property without due process of law. For a stronger reason would this be so in case of a not less arbitrary classification which does so result?

The fact that the constitution does not forbid the classification of cities for some purposes, does not authorize such classification for all purposes. Still less does such absence of prohibition leave the door open, in any case, for a violation of the constitutional provisions in question.

The true rule applicable may be thus stated:

Legislation in favor of territory within cities having a certain population "in order to be valid must extend to and embrace all persons who are or may be in like circumstances and the classification must be natural and reasonable and based upon a substantial distinction which makes one class so different from another as to suggest the necessity of different legislation with respect thereto." *Hubbell vs. Higgins*, 126 N. W. 914.

96 We challenge the presentation of any substantial distinction between territory within and territory without cities of the first-class that would suggest the necessity of different Legislation with respect thereto, with reference to the disposition of the fund in question.

Respectfully submitted,

L. W. KEPLINGER,
C. W. TRICKETT,
Attorneys for Appellant.

97 And afterward and on the 13th day of December 1913, the same being one of the regular judicial days of the July 1913 term of the Supreme Court of the State of Kansas, before said court, in session at the Supreme Court room in the city of Topeka, the following proceedings among others was had, and entered or record as follows, to-wit:

98 In the Supreme Court of the State of Kansas, Saturday, December 13, 1913.

No. 18979.

CITY OF KANSAS CITY, Appellee,

VS.

SAMUEL STEWART, County Treasurer, etc., Appellant.

Journal Entry Allowing Rehearing.

Now comes on for decision the petition for a re-hearing of this cause; thereupon it is ordered that said petition be allowed and that this cause be assigned for a re-hearing at the April, 1914 session of this court.

99 And afterward on the 8th day of April 1914, the same being one of the regular judicial days of the January term 1914, of the Supreme Court of the State of Kansas, before said court, in session at the Supreme Court room in the city of Topeka, the following proceedings among others was had, and entered of record as follows, to-wit:

100 In the Supreme Court of the State of Kansas, Wednesday, April 8, 1914.

No. 18979.

CITY OF KANSAS CITY, KANSAS, Appellee,

VS.

SAMUEL STEWART, as County Treasurer, etc., Appellant.

Journal Entry of Submission.

A rehearing having heretofore been allowed this cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Wyandotte

County, Div. 3; thereupon after oral argument by L. W. Keplinger for the appellant, and by R. J. Higgins for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

101 And afterward and on the 9th day of May 1914, the same being one of the regular judicial days of the January term 1914, of the Supreme Court of the State of Kansas, before said court in session at the Supreme Court room in the City of Topeka, the following proceedings among others was had and entered of record as follows, to-wit:

102 In the Supreme Court of the State of Kansas, Saturday, May 9, 1914.

No. 18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, as Co. Treas., et etc., Appellant.

Journal Entry of Judgment.

This cause comes on for re-decision; thereupon it is ordered and adjudged that the judgment of affirmance heretofore entered be adhered to. It is further ordered that the appellants pay the costs of this case in this court taxed at \$—, and hereof let execution issue.

103 And also on said 9th day of May 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Opinion of the court in said cause, which is in the words and figures as follows, to-wit:

104 No. 18979.

THE CITY OF KANSAS CITY, KANSAS; Appellee,

v.

SAMUEL STEWART, as County Treasurer, etc., Appellant.

Appeal from Wyandotte County (Division No. 3).

On Rehearing. Affirmed.

Syllabus by the Court—Mason, J.

Improvements, the cost of which is charged by a city to the benefited property, are so far public in their nature that the legislature may require the county to bear a part of the expense of collecting the assessments, by giving a rebate or premium for their prompt payment.

All the Justices concurring.

A true copy.

Attest:

Clerk Supreme Court.

105

No. 18979.

The opinion of the court was delivered by—

MASON, J.:

Upon a rehearing full consideration has been given to the additional argument of counsel, but the previous conviction of no member of the court has been changed, and it results that the decision already made is adhered to.

Regarding the contention that the statute which requires the penalty accruing on the tax of a township (or other municipality) to go to the county, violates the constitutional provisions against diverting a tax from the object for which it was levied, this may be added: The tax being laid under a system of laws of which this statute is a part, contemplates such a disposition of the penalty as is there provided, so that the proceeds go to the very place specified.

In behalf of the county the argument is made that whatever may be the rule as to general city taxes, the county can not be required to pay the rebates on special assessments for local improvements, or taxes levied to pay bonds issued for that purpose, because these are obligations created by the city in its proprietary rather than in its governmental capacity. We think however that the public has such an interest in these improvements that the cost of collecting pay for them may rightfully be cast upon the county. The allowance of a rebate to one who makes an early payment of his tax amounts to paying him a premium for his promptness. It is a legitimate device for facilitating the collection of all taxes, the expense of which the legislature has seen fit to make a charge against the county, just as it might have placed it upon the entire state. In itself it does not operate unequally. The inequality of the statute results from the fact that the penalties collected on the taxes of a city of the first class go to the city, while all other penalties are retained by the county. All tax payers, so far as concerns being allowed rebates, or charged with penalties, are treated alike. But a city of the first class receives a favor not granted to other municipalities, by being permitted to retain its penalties, and this inures to the benefit of those who pay its taxes. As stated in the original opinion

106 it is difficult to suggest a reason for the distinction. But there are many differences between the law regulating cities of the first class and that regulating cities of the second class for which it would be impossible to assign a specific reason beyond the fact that the legislature saw fit to make them. The two forms of government have much in common, but they differ in many details. If the statute were to be held invalid wherever it makes a distinction for which the court can not account on the basis of a difference in population, many enactments of long standing would have to be set aside. Under the general statutes of 1868 cities of the first class were required to collect delinquent special assessments by selling the property, while cities of the second class certified the amounts to the county authorities, who attended to the collection.

(Gen. Stat. 1868, ch. 18, Sec. 28; ch. 19, Sec. 30, par. 2.) The relation of the matter to population is obscure, but not more so than in the case of many other differences. In the defendant's brief the attempt is made (perhaps successfully) to show that a possible ground of distinction in the matter in hand, which was suggested in the original opinion, is ill founded both in theory and in fact. But a classification may be valid, although based on a mistaken belief as to how a law will work out.

The argument made against the statute, on the ground of its unjust operation, has much apparent force, but we are constrained to hold that only the legislature can grant relief.

The former decision is adhered to.

All the Justices concurring.

A true copy.

Attest:

Clerk Supreme Court.

107 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of said court do hereby certify that the foregoing pages are a true, full and complete transcript of the record and proceedings in the case of The City of Kansas City Kansas Appellee vs. Samuel Stewart as County Treasurer of Wyandotte County Kansas Appellant, and also the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Topeka this 25th day of September, 1914.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

108 And also on said 10th day of August 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Petition for a Writ of Error, which with all the endorsements thereof, is in the words and figures as follows, to-wit:

109 In the Supreme Court of the State of Kansas.

THE CITY OF KANSAS CITY, KANSAS, Appellee,
vs.

SAMUEL STEWART, as County Treasure- of Wyandotte County,
Kansas, Appellant.

Petition for Writ of Errors Assignment of Errors, and Prayer for Reversal.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above en-

titled cause the defendant hereby prays a writ of error from the said decision and judgment, to the Supreme Court of the United States and for an order fixing the amount of the cost bond to be given by the appellant.

And the said defendant appellant assigns the following errors in the Record and proceedings in said cause.

The Supreme court of the State of Kansas erred in holding and deciding that Section 1000 of the General Statutes of Kansas 1909 was valid. Said error is more particularly set forth as follows:

Said Court erred in holding and deciding:

First. That said section 1000 did not abridge the privileges and immunities of citizens or of this appellant as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Second. That said section as applied to this appellant did not deprive persons of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

Third. That said section does not deny persons the equal protection of the law.

For which errors the defendant asks that writ of error be allowed and that said Judgment of the Supreme Court (reported in 90 Kansas 846) be reversed and a judgment rendered for defendant.

L. W. KEPLINGER,

C. W. TRICKETT,

Att'ys for Appellant.

Aug. 17th, 1914.

Let writ of error be allowed upon execution of bond in the sum of \$500.00 *dollars*.

W. A. JOHNSTON,

Chief Justice Sup. Court of Kansas.

[Endorsed:] 18979. Kansas City, Kansas, vs. Samuel Stewart, Treasurer Wyandotte County. Petition for writ of error and allowance. Filed Aug. 10, 1914. D. A. Valentine, Clerk Supreme Court.

110 And afterward and on the 17th day of August, 1914, the same being one of the regular judicial days of the Supreme Court of the State of Kansas, before said court, in session at the Supreme Court Room in the city of Topeka, the following proceedings among others *was* had, and entered of record, as follows, to-wit:

111 In the Supreme Court of the State of Kansas, Monday,
August 17, 1914.

Before Johnston, C. J., at Chambers.

No. 18979.

THE CITY OF KANSAS CITY, Appellee,

vs.

SAMUEL STEWART, County Treasurer, Wyandotte County, Kansas,
Appellant.

*Journal Entry Allowing Petition for Writ of Error and Bond for
Appeal.*

Now comes the appellant herein and presents his petition for
the allowance of writ of error from the decision and judgment of
this court to the Supreme Court of the United States, and for an
order fixing the amount of the cost bond. And thereupon after
due consideration it is ordered that said petition for writ of error
be allowed and that the amount of the bond for costs and appeal, be
fixed at the sum of Five hundred dollars.

112 And also on the 31st day of August 1914, there was filed
in the office of the Clerk of the Supreme Court of the State of
Kansas, an Appeal Bond, in the above entitled cause, which is in
the words and figures as follows, to-wit:

113 In the Supreme Court of the State of Kansas.

18979.

THE CITY OF KANSAS CITY, KANSAS, Appellee,

vs.

SAMUEL STEWART, as County Treasurer of Wyandotte County,
Kansas, Appellant.

Bond.

Know all men by these presents, that we, Samuel Stewart as Treas-
urer of Wyandotte County, Kansas, as Principal and T. J. Lyons
sureties, are held and firmly bound to the City of Kansas City, Kan-
sas, in the sum of Five Hundred Dollars, to be paid to said City, to
which payment, well and truly to be made, we bind ourselves jointly
and severally firmly by these presents.

Sealed with our seals, and dated this 27 day of Aug. 1914.

Whereas, the above named appellant seeks to prosecute its writ
of error to the United States Supreme Court to reverse the judgment
rendered in the above entitled action by the Supreme Court of the
State of Kansas.

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

SAMUEL STEWART,
As Treasurer of Wyandotte County, Kans.
T. J. LYONS.

STATE OF KANSAS,
Wyandotte County:

T. J. Lyons being sworn says he is a resident of Wyandotte County, Kansas and that he is worth and that he has in said County property of the value of more than fifteen hundred dollars, over and above all exemptions and liabilities and debts.

[SEAL.]

T. J. LYONS.

Sworn to before me and subscribed in my presence this 26th day of August, 1914.

LURA N. MIDDAUGH,
Notary Public.

My Commission expires Aug. 5, 1915.

114 Endorsed: 18979. Kansas City vs. Sam'l Stewart. Cost Bond on Appeal to U. S. S. Ct. Approved by me this 8th day of Sept., 1914. W. A. Johnston, Chief Justice. Filed Aug. 31, 1914. D. A. Valentine, Clerk Supreme Court.

115 And also on the 19th day of September 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Writ of error in the above entitled cause, the original of which is in the words and figures as follows, to wit:

116 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the State of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said court, being the highest court of law or equity of the said State in which a decision could be had, in the suit between the City of Kansas City, Kansas and Samuel Stewart, as County Treasurer of Wyandotte County, Kansas wherein was drawn in question the validity of a Statute and of authority exercised under said Statute on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of such validity a manifest error hath happened, to the great damage of the said Samuel Stewart, as Treasurer of Wyandotte County, Kansas as by his complaint appears, We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court

of the United States, together with this writ, so that you have the said record and proceedings aforesaid, in the said Supreme Court at Washington, D. C., within thirty days herefrom to the end that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 19 day of Sept., 1914.

Issued at office in the City of Topeka, with the seal of the District Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[Seal of District Court U. S., District of Kansas. 1861.]

Allowed by MORTON ALBOUGH, *Clerk*.

W. A. JOHNSTON,

Chief Justice Sup. Court of State of Kansas.

116½ [Endorsed:] No. —. The Supreme Court of the State of Kansas. Samuel Stewart, as County Treasurer, Pl'tf in Error, vs. The City of Kansas City, Kansas, Def. in Error. Writ of error to the Supreme Court of the State of Kansas. Filed Sep. 19, 1914. D. A. Valentine, Clerk Supreme Court. Filed this — day of —, 1914. — —, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,

Supreme Court of the State of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all the things concerning the same.

In witness whereof, I hereunto subscribe my name, and *and* affix the seal of the Supreme Court of the State of Kansas, at office in the City of Topeka, this 19th day of September A. D. 1914.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of said Court.

117 And also on the 25th day of September 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Citation together with the acknowledgement of service in the above entitled cause the original of which is in the words and figures as follows, to-wit:

118 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Kansas City, Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.,

within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein Samuel Stewart, as Treasurer of the County of Wyandotte, State of Kansas, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Kansas this 14th day of September, 1914.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

KANSAS CITY, KANSAS, September 24, 1914.

I, attorney- of record for the defendant in error in the above entitled case, do hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

RICHARD J. HIGGINS,
City Att'y,

W. H. McCARMICK,
Ass't City Att'y,
Attorney- for the City of Kansas City, Kansas.

[Endorsed:] 18979. City of Kansas City, appellee, vs. Stewart, etc., appellant. Citation. Filed Sep. 25, 1914. D. A. Valentine, Clerk Supreme Court.

119 SUPREME COURT. STATE OF KANSAS, ss:

I, D. A. Valentine, clerk of the said court do hereby certify that there was lodged with me as such clerk on the — day of —, 1914, in the matter of the City of Kansas City, Kansas, Appellee, versus Samuel Stewart, as County Treasurer of Wyandotte County, Kansas, Appellant.

1. The original bond of which a copy is herein set forth.

2. Two copies of the Writ of Error, as herein set forth, one copy for the appellee, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 25th day of September, 1914.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

Endorsed on cover: File No. 24,440. Kansas Supreme Court. Term No. 284. Samuel Stewart, as Treasurer of Wyandotte County, Kansas, plaintiff in error, vs. The City of Kansas City, Kansas. Filed November 16th, 1914. File No. 24,440.

No. 284.

Office Supreme Court, U. S.

FILED

OCT 4 1915

JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

MOTION FOR WRIT OF CERTIORARI.

L. W. KEPLINGER,
C. W. TRICKETT,
Attorneys for Plaintiff in Error.

No. 284.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

MOTION FOR WRIT OF CERTIORARI.

The plaintiff in error moves the court to order the issuance of a writ of certiorari to the Clerk of the Supreme Court of the State of Kansas, directing said clerk to supplement the transcript of the record in said cause by certifying to this court a copy of the motion of plaintiff in error to amend the assignment of errors filed in said cause Oct. 13th, 1913, together with

a copy of the nunc pro tunc order of said court allowing said motion.

In support of which motion plaintiff in error presents the affidavit hereto attached.

L. W. KEPLINGER,

C. W. TRICKETT,

Attorneys for Plaintiff in Error.

State of Kansas, Wyandotte County, ss.

L. W. Keplinger being first sworn on oath says that the original assignment of errors required by the rules of the Supreme Court of Kansas to be filed by Appellants in case of appeal did not state the precise nature of the constitutional objections urged more fully than is stated in the Answer of plaintiff in error in the District Court of Wyandotte County, and that as shown by the record of this cause in said Supreme Court, proceedings were had in said court as shown by the journal entry thereof, a duly certified copy of which motion and journal entry are hereto attached.

L. W. KEPLINGER,

Subscribed in my presence and sworn to before me this 28th day of Sept., 1915.

[SEAL]

R. L. WINSHIP,

Notary Public.

In the Supreme Court of the State of Kansas.
 The City of Kansas City, Kansas,
Appellee,

vs.

No. 18,979

Samuel Stewart, as County Treasurer of Wyandotte County, Kansas,
Defendant.

MOTION TO AMEND ASSIGNMENT OF ERRORS.

Comes now the appellant and asks the court for leave to amend the assignment of errors to technically conform to the argument as presented in the brief, as follows:

That assignments 4, 5 and 6 be amended so as to read as follows:

ASSIGNMENT 4.

That paragraph 1000, General Statutes of 1909 in class legislation and unconstitutional and violates the Constitution of the State of Kansas, and also is in violation of Section 1 of the 14th amendment to the Constitution of the United States.

ASSIGNMENT 5.

That paragraph 9428 of the General Statutes of 1909 as amended by paragraph 1000, violates the Constitution of the State of Kansas and violates Section 1 of the 14th amendment to the Constitution of the United States, and that as so amended said section denies the equal pro-

tection of the laws, deprives persons of property without due process of law, is class legislation and abridges the privileges or immunities of one class of citizens in favor of another class of citizens.

ASSIGNMENT 6.

That to require rebates on property in cities of the first class to be paid by the county at large and requiring the county outside of the city to contribute its penalties to the county fund and exempting the property in the city from contributing its penalties to the same fund is in violation of the Constitution of the State of Kansas and is in violation of Section 1 of the 14th amendment to the Constitution of the United States, which said 14th amendment read as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law;"

and is likewise in violation of the 5th amendment to the Constitution of the United States which provides that no person shall be deprived of property without due process of law, nor shall

private property be taken for public use without just compensation and is further in violation of the 7th amendment to the Constitution of the United States in that the appellant has been denied a trial by jury.

KEPLINGER & TRICKETT,
Attorneys for Appellant.

Endorsed:—

18,979

In the Supreme Court
of the State of Kansas.

Kansas City, Kansas

vs.

Samuel Stewart, etc.

M O T I O N .

F I L E D

Oct. 13, 1913

D. A. Valentine

Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

Thursday, September 9th, 1915

The City of Kansas City, Kansas,

Appellee,

vs.

No. 18,979

Samuel Stewart, as County Treasurer of Wyandotte County, Kansas,

Appellant.

**Nunc pro Tunc Order Allowing Amendment
of Assignments of Errors.**

Now come Keplinger and Trickett, attorneys for the appellant herein and show to the court that on the 13th day of October, 1913, they filed with the clerk a Motion to amend the assignment of errors relied upon for the review of this appeal and that there is an omission in the record in regard to a ruling upon said motion, and now moves that the court make an order NUNC pro TUNC on the motion.

And thereupon, it appearing to the court, that a motion for the amendment of the assignment of errors of the appellant was filed on the 13th day of October, 1913, and that an Order allowing said motion was made on that day, but was omitted from the record, it is now ordered that said motion be allowed and that an order be entered as of the date of October 13th, 1913, allowing said motion to amend the assignment of errors as prayed for in said motion.

In the Supreme Court of the State of Kansas.

State of Kansas, }
Supreme Court, } ss.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing are full, true and correct copies of a motion to amend assignment of errors and a nunc pro tunc order allowing same in the above entitled case, as the same remains on file in my office.

Witness my hand and the seal of the
Supreme Court hereto affixed at
[SEAL] my office in Topeka, this 9th day
of September, A. D., 1915.

D. A. VALENTINE,

Clerk Supreme Court.



3
No. 284.

Office Supreme Court

FILED

OCT 4 1915

JAMES D. MAH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR ON
MOTION TO DISMISS.

L. W. KEPLINGER,

C. W. TRICKETT,

Attorneys for Plaintiff in Error.



No. 284.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR ON
MOTION TO DISMISS.

DIMINUTION OF RECORD.

On the 13th of October, 1913, and about one month before the rendition of the original decision the plaintiffs in error filed a motion in the Supreme Court in the following language:

"Comes now the appellant and asks the court for leave to amend the assignment of errors to technically conform to the argument as presented in the brief as follows," etc. An order was made on that date but the court omitted to call the attention of the clerk to the fact and the motion and the order allowing it to be filed was omitted from the original transcript.

On the 9th of September, 1915, a *nunc pro tunc* order was made in accordance with the above facts and plaintiff in error has filed a motion for *writ of certiorari* directing that the omitted portions of the record be returned.

The assignment of errors in this court, ^{*abolished*} ~~abolished~~ pp. 59, 60, is based on that amendment.

STATEMENT OF CASE.

Though in form a controversy between plaintiff in error and the city of Kansas City, Kansas, this is in fact a controversy between the Board of County Commissioners of Wyandotte County, and said City, and was so held and considered by the Supreme Court of Kansas. (Abstract, page 44.) The facts are as follows:

Session Laws of 1876, Sec. 91, Chap. 34, the same being paragraph 9428, Gen. Stat., 1909, provided for a rebate of 5 per cent on all taxes paid before December 21st in each year. It also provided for a penalty on all taxes not so paid. The closing paragraph of the section is as follows: "Provided all penalties shall be credited to the county fund and all rebates shall be charged to the same fund." The defendant in error now claims the right to recover of the county fund mentioned in that order a sum equal to the full amount contributed to that fund as penalties on property within the City.

This claim is based upon a law enacted in 1896, paragraph 1000, Gen. Stat. 1909, which is as follows:

"The County Treasurer shall on the 15th day of January, April 15th, July 15th, and Oct. 15th, of each year or oftener if received by the City Counsel pay over to the City Treasurer all moneys and evidences of indebtedness collected for and payable to the city and the city's proportion on all PENALTIES and interest collected."

The effect of this act was to materially lessen the amount of the tax levies for general purposes to be made

by the City Commissioners and at the same time correspondingly increase levies required to be made by the County Commissioners. Hence this controversy.

This paragraph was in an act applying only to cities of the FIRST class and the effect was to require all other cities and taxing districts to contribute the *penalties* on their property to a fund to pay rebates, but exempted cities of the *first* class. Or in other words, it required taxpayers outside of the city to make up a fund to pay the rebates on property within cities of the first class, and exempted cities of the first class from contributing thereto. It permits cities of the first class to participate in and secure the benefit of a fund to which they do not contribute. They do contribute in the first instance, but they are permitted to withdraw such contribution. It increases taxes in all outside taxing districts to the end that taxes may be reduced in cities of the first class.

The rebates on property within the city of Kansas City, Kansas, which is a city of the first class, equals or is in excess of the penalties paid by property owners in said city, and a controversy arose between the County Commissioners and the city as to whether the city under the constitution was entitled to the penalties.

Thereupon the County Commissioners made the following order:

"Whereas for the years 1909, 1910 and 1911, the rebates allowed owners of real estate and personal property when full payment was made in December, was by the County Treasurer charged to the general fund of Wyandotte County, Kansas, on all property within the

corporate limits of the city of Kansas City, Kansas; and

Whereas the County Treasurer paid to the treasurer of the city of Kansas City, Kansas, the full amount of their taxes without deducting therefrom the amount of rebates so allowed, thereby causing the county and tax payers outside of the corporate limits of Kansas City, Kansas, to pay a part of the taxes of the said city of Kansas City, Kansas, and

Whereas, the city of Kansas City, Kansas, is claiming the penalties charged upon property in said years 1909, 1910, 1911, and

Whereas, the rebates during said years exceed the penalties by the sum of \$30,840.24 on city taxes, and

Whereas, the Board of County Commissioners has caused to be ascertained the overpayment in each of the various funds of the city of Kansas City, Kansas, that is the excess of the rebates over penalties for each of the years named,

Now Therefore Be It Resolved, that the County Clerk and the County Treasurer be and are hereby directed to charge such over-payment against the various funds as follows, to-wit:

(For list see transcript of record, pages 10, 11.)"

The County Clerk of Wyandotte County complied with said order, and charged upon the books of the treasurer, in the manner provided by statute, and the County Treasurer likewise complied with said order.

Thereupon the city of Kansas City brought an action of mandamus in the District Court of Wyandotte County to compel the County Treasurer to pay

over said rebates to the city. To which alternative writ the County Treasurer made answer which among other matters was as follows:

"And this respondent further answering says, that so far as he is able to ascertain the object and purpose of this suit, it is an attempt to compel respondent to pay to the relator a sum in excess of the amount of taxes collected upon said property for the relator; that there is a controversy pending between the city of Kansas City, Kansas, and the Board of County Commissioners of Wyandotte County, Kansas, as to the fund to which shall be charged the rebates allowed by law upon city property, and this respondent further says that by reason of the controversy between the Board of County Commissioners of Wyandotte County, Kansas, and the relator, that this respondent cannot safely pay to the relator any sum asked for by the relator without becoming individually liable therefor; and this respondent further answering says that any statute or enactment that requires or results in requiring property owners outside of Kansas City, Kansas, to pay any portion of the taxes of Kansas City, Kansas, is unconstitutional and void; and respondent further says that any law requiring respondent to take from the County's general fund any sum to make good the rebates upon city property is unconstitutional and void; that the same would be unjust and unequal, and depriving residents outside of Kansas City, Kansas, of their property without just compensation."

For answer in full see Transcript of record, 30-31.

The writ was allowed which action was affirmed by the supreme court, Justices Johnston and Benson dissenting.

BRIEF AND AUTHORITIES.

It is claimed the record does not show that a federal question was raised in the State Court. The answer to the alternative writ, Transcript, page 31, states that the law in question is unconstitutional and void, that to require property owners outside of Kansas City, Kansas, to pay any portion of the taxes of Kansas City, Kansas, "would be unjust and unequal and depriving residents outside of Kansas City, Kansas, of their property without just compensation." True the word constitution is ambiguous. It may mean Federal or State. But the Syllabus of the opinion which the statute requires to be filed in the case, does show that the word "constitution" was understood to mean Federal Constitution, and that the Federal Question was expressly decided. Again it is not necessary that there should be an express mention of the Federal Constitution, and the allegation that property was taken without just compensation brings the case within the Federal Constitution as clearly as if there had been an express reference thereto. While it is true that the opinion cannot be referred to to see whether or not a Federal Question was raised, it can be referred to to see what was decided.

General Statutes of Kansas, 1909, Section 2371, provides that:

"When a case is decided by the Supreme Court the judge delivering the opinion shall at the time the decision is made file with the clerk a brief

statement in writing of the points decided in the case."

This syllabus appears on page 57 of the transcript of record, and it shows that the Federal questions were considered and decided.

Again a petition for rehearing was filed, which expressly raised a Federal Question. (Transcript, page 54.) And this petition for a rehearing was sustained, and the case set down for reargument. (Transcript, page 57.)

Then if not before the Federal Questions were squarely before the court, and the court in its opinion says that "the decision already made is adhered to."

True, even though the petition for rehearing did raise the Federal Question, if an order overruling such motion, should merely show that the motion was overruled, it would not be presumed that the Federal Questions raised had been decided, but if it should appear, even where the petition for rehearing is overruled, that the court had considered the Federal Questions raised, and determined against the petitioners then it would appear that the Federal Question had been raised and decided. But in this case the petition for rehearing was expressly based upon the fact that the Federal Question was involved, and the petition was not overruled, but was sustained, and upon the rehearing, the Federal Question was directly before the court, and when the court says the former opinion is adhered to, and when the former opinion shows on its face that the Federal Questions were passed upon, it would be difficult to imagine a case where it more clearly appears that the

Federal Questions were raised and passed upon.

That where a petition for rehearing raising a Federal question is sustained, the Federal question is put in the record has been expressly held by this court.

Leigh v. Green, 183 U. S., 79;

Manley v. Park, 187 U. S., 547.

On the merits the situation may be thus stated: A general law applicable throughout the state enforces collection of a large sum of money which, when collected goes into and becomes a part of the general fund of the several counties of the state. A later law (since repealed) applicable only to counties having a city of the first class, transfers a large portion of this general county fund to the general fund of such city. The necessary effect of this law is to largely decrease the tax levies required to be made by the City Commissioners and that required to be made by the County Commissioners ^{and largely increase} on property having the same value, to

~~the up difference~~ ^{occasional by rebates} The act makes an arbitrary classification both of counties and of cities. It puts counties which do, and these which do not have a city of the first class in different classes and it makes radically different provisions with respect to what shall be the general county fund in the two classes. Also it selects cities of the first class and makes them its exclusive beneficiary although there is no logical basis for the distinction made between such cities and other political subdivisions. But even if there were that would not be any reason why a distinction should be made between the county and other counties.

The petition for rehearing is based upon the due

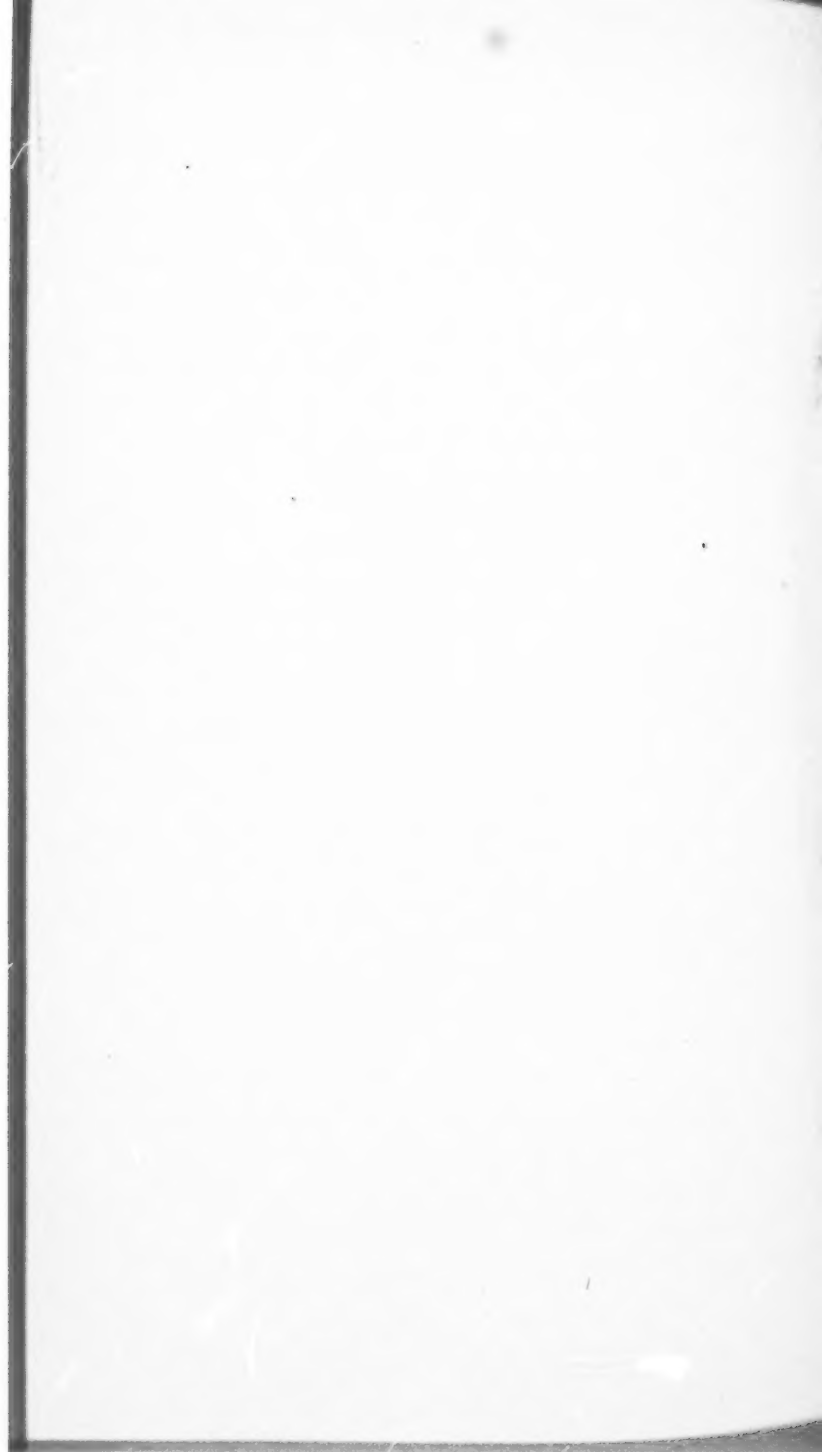
process of law as well as the equal protection of the law ^{clause} ~~claims~~ of the Federal Constitution. The original law provides for making a deficiency arising from non-payment of taxes on property within as well as without the city. The amendment gives to cities out of the general County fund a large sum, the exact amount depending upon the extent to which city property owners have paid in penalties. As necessary results, the amount the City Commissioners have to collect as taxes is materially less than ^{before} ~~the~~ County Commissioners are compelled to collect from property of the same value. The difference here is over \$30,000, but if it were \$300,000 the principle involved would be the same.

All of which is respectfully submitted,

L. W. KEPLINGER,

C. W. TRICKETT,

Attorneys for Plaintiffs in error.



FILED

OCT 18 1915

JAMES D. MAHER

CLERK

No. 284

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF WYANDOTTE COUNTY, KANSAS, PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
KANSAS.

ANSWER BRIEF OF DEFENDANT IN ERROR
ON MOTION TO DISMISS.

RICHARD J. HIGGINS,

Kansas City, Kansas,

Attorney for Defendant in Error.

No. 284.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF WYANDOTTE COUNTY, KANSAS, PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
KANSAS.

**ANSWER BRIEF OF DEFENDANT IN ERROR
ON MOTION TO DISMISS.**

In reply to the motion to dismiss, the plaintiff in error in his brief asserts that he has procured an order *nunc pro tunc* from the Supreme Court of Kansas, which shows that an amended assignment of errors was filed after the argument in the Supreme Court of Kansas,

which assignment of errors set up a federal question. Such amendment is not in the record. Because of what appeared to us to be a quite evident failure of the record to disclose even a bare statement of a federal question, we did not, in our argument in support of the motion, present other objections which are quite as apparent and should be noticed in considering the motion.

I.

The record discloses no defense in favor of the plaintiff in error against the suit of the defendant in error.

Under the laws of Kansas for many years it has been the rule that the County is the collection agency for all taxes. It is one of the statutory duties of the County government. It is not even suggested that the Legislature in making this requirement transgressed any constitutional restrictions. As a part of the tax collecting scheme and evidently designed to induce tax payers to meet their obligations promptly, the law requires the county treasurer to allow any person who pays the full amount of his tax on or before December 20th, a rebate equal to two and one-half per cent of such tax, which rebate is required to be charged against the county fund.

Section 9428, General Statutes 1909, provides: "That any person charged with taxes on the tax books in the hands of the County Treasurer may, at his option, pay the full amount thereof on or before the twentieth day of

December of each year, or the one-half thereof on or before the twentieth day of December and the remaining one-half thereof on or before the twentieth day of June next ensuing; * * * That if any person shall pay the full amount of his taxes on or before the twentieth day of December of each year, he shall by the treasurer on his tax receipt be allowed a rebate of five per cent on that portion becoming due on the twentieth day of June; * * * All penalties shall be credited to the county fund and all rebates charged to the same fund."

During the years 1909, 1910 and 1911, it is alleged in the answer (Record 31) *the County Treasurer allowed to the owners of real estate and personal property, rebates amounting to \$30,840.24, and charged the same against the County's fund.* The allowance was, of course, to the owners of the real estate; the City of Kansas City, Kansas did not pay the tax, and it could not, therefore, obtain the rebates. The County Treasurer now conceiving that his allowance of these rebates, and the charge thereof against the county's fund, was in violation of law, seeks to collect back such sum; not from *the owners of real estate and personal property* who received them, but from the City of Kansas City, Kansas. Why collect from the City of Kansas City, Kansas, the money paid under an unconstitutional law to certain taxpayers of the City? What warrant in law has the county treasurer for such a proceeding?

It is, we think, quite evident that no defense is stated by the plaintiff in error, defendant below, in that portion

of his answer wherein he states that the law, under which he allowed to tax payers—who had paid the full amount of their taxes—a rebate, is unconstitutional.

Therefore the question submitted is moot, for no controversy exists between the parties hereto as to the law. A controversy could arise between a tax payer and the County Treasurer wherein the constitutionality of the law might be assailed, but we have not such a case before this court.

Assuming this court would entertain jurisdiction of this case and find the law was unconstitutional, what would be the result? Surely no court would not require the City to restore what it never received. Clearly it would be a very unconstitutional requirement that the City should respond, on account of the money that the County Treasurer paid to certain taxpayers owning property within the City.

Another angle to this controversy is the liability of the county for penalties collected by it, on account of delinquent taxes. The penalties are actually received and collected by the county. The law requires that such money be paid to the city. The County Treasurer asserts the law is unequal and unconstitutional because the county is allowed to retain for itself penalties collected on account of taxes levied by other subdivisions of the state government. This court has never adjudged that under the federal constitution it was necessary for a state to make all laws applicable to its counties, cities, towns, school districts, drainage districts, etc. equal. Should

such be the effect of the constitution we will find "federal questions" will arise in the enforcement of nearly all acts wherein corporate power is granted to any political subdivisions of a state. We assert that insofar as the State of Kansas is concerned any astute lawyer can find in any law regulating any city an "inequality" as compared with laws governing other classes of cities.

This court has decided (and the case was cited by the Supreme Court of Kansas in its opinion in this case) *Railroad Company v. County of Otoc*, 83 U. S. 676, "Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the Legislature has undoubted power to apportion a public burden among all the taxpayers of the State, or among those of a particular section."

Wherefore we most respectfully submit that the writ should be dismissed.

RICHARD J. HIGGINS,
Kansas City, Kansas,
Attorney for Defendant in Error.



No. **284**

Office Supreme Court

FILE

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JAMES D. MA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

Notice of Hearing and Affidavit in Support of
Motion for Writ of Certiorari.

L. W. KEPLINGER,
C. W. TRICKETT,
Attorneys for Plaintiff in Error.

No. 416.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,
VS.
THE CITY OF KANSAS CITY, KANSAS,
DEFENDANT IN ERROR.

NOTICE.

To The Defendant in Error:—

You are hereby notified that the motion for writ of certiorari heretofore served on you in the above entitled cause will be presented at the same time with the motion of defendant in error to dismiss.

The affidavit hereto attached will be presented in support of said motion.

KEPLINGER & TRICKETT,

Attorneys for Plaintiff in Error.

Service of the above notice accepted this
14th day of October, A. D. 1915.

RICHARD J. HIGGINS,

Attorney for Defendant in Error.

In the Supreme Court of the United States.

October Term, 1915.

Samuel Stewart, as County Treasurer of Wyandotte County, Kansas,

Plaintiff in Error,

vs.

The City of Kansas City, Kansas,

Defendant in Error.

AFFIDAVIT.

State of Kansas, }
Wyandotte County, } ss.

L. W. Keplinger, being duly sworn, says that he is one of the attorneys for the plaintiff in error in the above entitled cause; that the attorneys for the plaintiff in error had no knowledge of the failure of the clerk of the Supreme Court to make an entry of the order made by the Supreme Court of the State of Kansas on the 13th day of October, 1913, allowing the amendment of the assignment of errors in cause No. 18,979 in said court, until the receipt of the record in said cause, about the month of August of the present year.

Affiant further says that at the next session of said Supreme Court, affiant made application to said court for the nunc pro tunc order, a copy of which appears in the affidavit of affiant attached to the motion of plaintiff in error, filed herein.

Affiant further says that heretofore, the plaintiff in error filed its motion in this court for the dismissal of the writ of error herein, and the affirmation of the judgment, or to advance the cause, together with his brief and argument in support of the same; and that thereupon plaintiff in error filed and served copies of his reply brief, in which the fact of the filing of the motion of plaintiff in error for a writ of certiorari herein, and the nature of said motion, was stated; also, that in the latter part of September, 1915, plaintiff in error delivered to defendant in error a copy of the motion for writ of certiorari herein.

And further affiant saith not.

L. W. KEPLINGER,

Subscribed and sworn to before me this 14th day of October, A. D. 1915.

My commission will expire March 31, 1918.
(SEAL)

JOHN G. MILLER,

Notary Public.

6
No. 284

WILLIAM MAHER, JR.
FILED
OCT 18 1915
JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
KANSAS.

Motion of the City of Kansas City, Kansas, Defendant
in Error, to Dismiss the Writ, Affirm the
Judgment, or to Advance the Cause.

RICHARD J. HIGGINS,
Kansas City, Kansas,
*Attorney for The City of Kansas City,
Kansas, Defendant in Error.*

No. 284.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

SAMUEL STEWART, AS TREASURER OF
WYANDOTTE COUNTY, KANSAS,
PLAINTIFF IN ERROR,

VS.

THE CITY OF KANSAS CITY, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
KANSAS.

MOTION.

The City of Kansas City, Kansas, defendant in error, moves the court:

First. To dismiss said cause for the reasons (a) that no federal question is involved, (b) any federal question involved has been repeatedly determined by this court adverse to the claims of plaintiff in error; or if said motion be denied,

Second. To affirm the judgment of the trial court, for the reason that the writ of error was procured for delay only, and the questions upon which the jurisdiction of this court depends are so frivolous as not to require further argument; or in the event that said cause be neither dismissed or affirmed,

Third. To transfer said cause to the summary docket as provided by the rules of the court.

RICHARD J. HIGGINS,
*Attorney and Solicitor for The City of
Kansas City, Kansas, Defendant in
Error.*

STATEMENT OF CASE.

Kansas City, Kansas, a city of the first class under the laws of Kansas, brought mandamus against Samuel Stewart, County Treasurer of Wyandotte County. Under the laws of Kansas, all taxes levied by cities are certified to the County Clerk, placed on the tax rolls, and turned over to the County Treasurer for collection. All taxes are due on November 1st and may be paid on or before December 20th, but the tax payer has the option of paying one-half of his taxes before November 20th, the other half being payable on or before the succeeding 20th day of June. If all of the tax is paid on or before December 20th the County Treasurer is required to allow a rebate of five per cent (5%) on that portion of the tax which is due on June 20th. The rebate is required by law to be charged against the county's fund.

The County Treasurer of Wyandotte County, acting pursuant to law, during the years 1909, 1910 and 1911, allowed and paid as rebates on taxes levied by Kansas City, Kansas, \$30,840.24, which sum was charged against the fund of Wyandotte County, Kansas. On January 7th, 1913, the Board of County Commissioners of Wyandotte County, Kansas, made an order (Record 9) requiring the County Treasurer to charge against the funds of Kansas City, then in his possession, the aforesaid sum of \$30,840.24, and to credit the same to

the account of Wyandotte County, which order the County Treasurer carried out. The City brought mandamus to compel the County Treasurer to pay to it this money. No right under the Constitution or laws of the United States was set up in the mandamus, the treasurer answering set up many defenses on non-federal grounds, and in paragraph VII of his answer (Record 31), made the only claim which could be said to give a basis for the jurisdiction of this court, said paragraph is as follows:

"And this respondent further answering says that any statute or enactment that requires or results in requiring property owners outside of Kansas City, Kansas, to pay any portion of the taxes of Kansas City, Kansas, is unconstitutional and void and respondent further says that any law requiring respondent to take from the county's general funds any sum to make good the rebates upon city property is unconstitutional and void; that the same would be unjust and unequal and depriving residents outside of Kansas City, Kansas, of their property without just compensation."

BRIEF AND AUTHORITIES.

It is manifest that the answer does not raise a federal question. No reference is made to the Constitution of the United States, or any section thereof, or to any law of Kansas which is claimed to be involved herein. It is a mere broad, general (but incorrect) statement of a legal principle. This court has repeatedly held that in order to establish a basis for the jurisdiction of this court, the federal question must be clearly raised in the trial court, if not the writ of error will be dismissed.

*Roman Catholic Church, etc. v. Pennsylvania
Railroad Company, U. S. Adv. Ops. 1914,
page 729.*

RICHARD J. HIGGINS,
Kansas City, Kansas,

*Attorney for The City of Kansas City,
Kansas, Defendant in Error.*

*To Samuel Stewart, as Treasurer of Wyandotte County,
Kansas, Plaintiff in Error:*

You are hereby notified that on the day
of, A. D. 1915, or as soon thereafter
as the same can be heard, the defendant in error will
present the above motion to dismiss, advance or affirm.

.....
Attorney for Defendant in Error.

Service of the foregoing motion, argument and notice is hereby acknowledged on this day ofA. D. 1915.

.....
*Attorneys for Samuel Stewart as Treasurer of Wyandotte County Kansas,
Plaintiff in Error.*

STEWART, TREASURER WYANDOTTE COUNTY,
KANSAS, *v.* CITY OF KANSAS CITY, KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 234 Motion to dismiss or affirm submitted October 18, 1915.—
Decided November 1, 1915.

What the duty of a county officer is under the law of the State of which he is an instrument is a local question and this court has no jurisdiction under § 237, Judicial Code, to review the judgment of the state court.

A county officer has no personal interest in a litigation brought to compel him to apply public moneys in his hands in accordance with the state law, and he cannot defend such a suit on the ground that the statute is unconstitutional as depriving him as an individual or as a taxpayer of his property without due process of law or denying him the equal protection of the law.

Municipalities of the State are creatures of the State and the power of the State thereover is very broad and may be exercised in many ways affecting the property of, and giving rise to inequalities between, municipalities without encountering the due process and equal protection provisions of the Fourteenth Amendment.

The statute of Kansas requiring counties to reimburse municipalities of the first class, but not of other classes, for rebates allowed for prompt payment of taxes is not unconstitutional under the due process or equal protection provisions of the Fourteenth Amendment.

Writ of error to review 90 Kansas, 846, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, to review a judgment of the state court in a case involving the rights and duties of a county officer, are stated in the opinion.

Mr. William H. McCamish and *Mr. R. J. Higgins* for defendant in error in support of the motion.

239 U. S.

Opinion of the Court.

Mr. L. W. Keplinger and *Mr. C. W. Trickett* for plaintiff in error in opposition to the motion.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action originated in a petition for mandamus filed in the District Court of Wyandotte County, Kansas, by defendant in error against plaintiff in error to require the latter to account for the sum of \$30,840.24 alleged to be due defendant in error under certain taxing statutes of the State.

Judgment was entered for defendant in error which was affirmed on appeal by the Supreme Court of the State. The case was then brought here.

Motion is made to dismiss, on the ground that no Federal question was raised or passed on by the state court, or alternatively to affirm the judgment.

The controversy is stated by the Supreme Court of the State as follows, 90 Kansas, 846, 847:

"The question in dispute concerns the disposition of the penalties imposed by law for delinquency in the payment of taxes levied by and for the city. In substance it is this: Is the county required to reimburse a city of the first class for the amount by which the taxes collected for the city are reduced by rebates granted for prompt payment, and at the same time to pay over to the city the amount collected as penalties for delay in the payment of taxes levied by the city, while in the case of taxes levied by cities of the second and third classes, and by townships and school districts, the rebates are charged to the county and the penalties credited to it?"

The question was answered in the affirmative, citing and construing the state statutes and upon a consideration of the legislative power of the State over its municipal subdivisions. Plaintiff in error urged and now urges that the

statutes so construed deprive taxpayers of the county who reside outside of cities of the first class of property without due process of law and deny them the equal protection of the law.

Plaintiff in error is not impleaded as a taxpayer nor does he defend as such. He is sued as a county officer and defends by virtue of the exercise of his functions as a county officer. In other words, he defends by virtue of laws of which he is an instrument. Constituted by the laws of the State, he yet attempts to resist one of its laws. Whether he may do so is purely a local question. *Smith v. Indiana*, 191 U. S. 138. He certainly has no personal interest in the litigation. *Braxton County Court v. West Virginia*, 208 U. S. 192; *McCandless v. Pratt*, 211 U. S. 437; *Marshall v. Dye*, 231 U. S. 250.

If, however, plaintiff in error is not estopped by that consideration he encounters another. It is manifest that the statute assailed was enacted by the State in regulation of its municipalities, and the power to do this is very broad. It was said in *Railroad Company v. County of Otoe*, 16 Wall. 667, 676, that "counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will." This power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities. It has been exercised to enlarge or contract the boundaries of municipal corporations, invest them with special powers, divide and apportion their property. *Kies v. Lowrey*, 199 U. S. 233; *Braxton County Court v. West Virginia*, *supra*. It would be difficult to define the restrictions upon this power of control and keep it efficient. It is very certain that the Kansas statute does not transcend the limitations. We think the questions raised are more formal than substantial, and the writ of error is

Dismissed.